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S. HRG. 105-303, PT. 1

SOVEREIGN IMMUNITY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

OVERSIGHT HEARING TO PROVIDE FOR INDIAN LEGAL REFORM

MARCH 11, 1998
WASHINGTON, DC

PART 1

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U.S. GOVERNMENT PRINTING OFFICE
47–201 CC WASHINGTON : 1998

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-057174-X

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OVERSIGHT HEARING ON TRIBAL SOVEREIGN IMMUNITY

WEDNESDAY, MARCH 11, 1998

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to other business, at 9:35 a.m. in Room 216, Hart Senate Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, Gorton, and Dorgan.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. We will now begin with the committee's first hearing of the year on S. 1691. Today, we will deal with contracts involving tribes and second, the collection of State taxes on sales made by tribes to non-Indians.

S. 1691, introduced by Senator Gorton, is arguably the most meaningful legislation since the Termination Era of the 1940's and 1950's, in my opinion. In fact, some have suggested that it is really a bill of the 1990's for termination. Whichever view you take, however, these hearings really are about whether the aboriginal Americans, the first Americans, are members of this Nation first or members of a multitude of nations within this Nation.

My own view is they can be both, should be both and are both. My view, of course, is not universally held and I respect that.

Immunity from lawsuits is an attribute that three sovereigns—the United States Government, the States, and the tribes—have in varying degrees as a tools to protect their treasuries and to ensure their viability. Immunity has been a key ingredient to the development of all three governments.

Federal, State, and tribal governments have voluntarily waived their immunity and allowed themselves to be sued and continue to do so. After decades of failed Federal policies, Indian tribes in recent years have begun to fulfill the promise that President Richard Nixon made in announcing his self-determination policy of building stronger governments and economies.

These efforts have brought higher levels of interaction and engagement between tribes and local governments, non-Indian businesses and non-Indians too. These efforts I support and encourage and will continue to encourage. As is with human nature, along

with more economic activity and job creation, more levels of interaction and engagement, there often comes more conflict and dialog.

We will receive testimony today regarding commercial contracts involving Indian tribes and the collection of retail taxes on sales made to non-Indians. There will be three hearings, as most people know. Let me also say that the kind of major changes in Federal law regarding Indians contemplated by S. 1691 should not be taken lightly.

If enacted, this legislation would have a significant impact on tribal governments and Indian people. As the committee proceeds, I'm hopeful we can fairly review the issues in this legislation and hammer out reasonable approaches to the problems faced by tribes and other interested parties.

We will also have a hearing on April 7 in Seattle, WA, which you may like to attend, people in the audience, if you are in that area. The actual location is still being worked out. We will also at that time be dealing with civil and property rights.

We will do another hearing on April 9 in Minneapolis, MN dealing with torts.

This is obviously a very emotional issue for people from both sides. I would simply encourage those in the audience and those testifying to observe the decorum of the Senate and would remind people that their full statements will be included in the record.

Because we have so many people who wish to testify, we simply had to put some limits on the total number and some did not get to testify, but those people who have written statements they would like to be introduced in the record, those will be completely included and will be studied by all of us here on the committee.

We also will be enforcing the 5-minute rule because we have a number of votes today and we do have some limited time.

With that, I'd like to turn to the vice chairman, Senator Inouye, if you have an opening statement.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, sir.

The committee meets this morning to address matters that apparently have given rise to the introduction of a measure by our colleague and friend, the senior Senator from the State of Washington.

If we are to properly address these matters, we must have a clear understanding of the historical and legal context in which they operate. Indian tribes and nations are governments. Should there be any doubt about the accuracy of this statement, we need only to look to the writings of our founding fathers and the subsequent debates in the Continental Congress.

It is there that we find some of the earliest recorded observations of the governmental structure of the Confederacy of the Iroquois Nations. In fact, I believe it is abundantly clear that the Iroquois Confederacy's form of government was the model of government that our founding fathers ultimately adopted in forming and organizing the government that was to become the United States of America.

Should one desire further evidence that Indian nations are sovereign governments, we can look as well to the fact that the United States entered into treaties with the Indian nations, 800 of them. Our Constitution makes clear that treaties are the documents which express the legal relationships between sovereigns and that as such, they are the highest law of the land.

Beginning in 1832 and for 166 years thereafter, the U.S. Supreme Court recognized and has consistently reaffirmed the inherent sovereignty of the Indian nations. Over the course of our history as a Nation, the U.S. Congress, with the approval of every President of the United States, has enacted into Federal law, literally hundreds of legislative initiatives that are premised upon the fundamental principle that the Indian nations are sovereign governments. This is where we begin. This is the foundation of law and policy upon which our relationships with the Indian nations have been built, shaped, and defined for well over 200 years.

My colleague's bill, as I understand it, would divest the Indian nations of their governmental status and relegate them to the status of individuals or private corporations for the purpose of legal actions in State and Federal courts. Given this dramatic and some would say radical departure from the well-established course of our history and our laws, I believe it is only natural to inquire what may be in law or in fact that would require us to so abruptly abandon what has stood for so long.

In the area of taxation, the U.S. Supreme Court has established the law in the case of *Montana* v. *The United States.* There, the Court stated,

> To be sure Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands, a tribe may regulate through taxation, licensing or other means, the activities of non-members who enter the consensual relationship with the tribes or its members through commercial dealings, contracts, leases or other arrangements.

We have ample evidence that State and tribal governments are not only capable of, but regularly do enter, compacts and agreements addressing matters of taxation. Just a few months ago, several such agreements entered into by the State of Washington and some of the tribal governments in Washington State were made available to this committee.

Of course they are not alone. Taxation agreements have been entered into by States and tribes all over the country. Because both State and tribal governments are recognized as having the authority to tax, these agreements typically address matters such as the exercise of those authorities by each government, the apportionment of taxation, and the manner in which taxes are to be collected.

These agreements customarily also provide one or more mechanisms for the resolution of disputes should they arise. These may include mediation, arbitration or an agreement that the parties will seek determination by a court of competent jurisdiction.

If a judicial determination is the mechanism elected by the governments for the resolution of any disputes that may arise, it is also common that mutual waivers of their respective rights to assert sovereign immunity are contained in their agreement or compact. These compacts and agreements are consistent with the man-

ner in which the governments of our Nation have always defined and shaped their relationship with one another.

I'm not aware of any compelling body of evidence that would warrant the taking of a unilateral action by a third government, one which is not a party to the matters at issue. I know of no precedent for the fashioning of a cause of action that the authorizes one government to bring claim against another government but bars the other government from having its claims heard.

Supreme Courters expressly rejected this notion in a case known as *Blanchfalt* v. *The Native Village of Nortak* on the grounds that there must be a mutuality of consent by both governments to be sued and sue.

Having reviewed the written testimony submitted to the committee for today's hearing, let us also be clear that what some would seek from this body is not an alternative means of collecting State taxes, but rather, action by the Federal Government to assert and assure that commercial activities conducted on Indian lands are rendered incapable of competing in a free marketplace.

Mr. Chairman, in compliance with the spirit of this meeting, my statement is exceedingly long because of the important nature of the matter being discussed, I request that the remainder of my statement be made a part of the record.

The CHAIRMAN. Without objection, it will be included in the record.

[Prepared statement of Senator Inouye appears in appendix.]

Senator INOUYE. I would also suggest, which I did not do at the budget, I would suggest that the letter of views and estimates be given the widest circulation because it sets forth in rather clear, precise language what the needs of Indian country are.

The CHAIRMAN. Without objection, that also will be done.

I would now go to Senator Gorton.

I would remind everyone who came in after my statement, this is the first of three hearings. This one primarily will deal with contracts and taxes. The one in Washington will deal primarily with civil and property rights and the last one in Minneapolis will deal primarily with torts.

Senator Gorton.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Mr. Chairman, I should like to start by saying that in listening with care to your own opening statement, I was encouraged by the proposition that you laid out that there is a problem with which this bill deals and there may very well be a method by which to accommodate the very real and legitimate needs and interests of all the contending parties. It's obviously early in this game, but your openness to some suggestions of that nature is extremely welcome.

The Supreme Court of the United States, to put the question of sovereignty precisely, has described Indian tribes as domestic dependent sovereigns. That is the nature of their sovereign. It is not unlimited. They are a part of the United States of America, they are subject to the Constitution.

The issue that we are dealing with in this bill has nothing to do with sovereignty or, for that matter, with domestic dependent sovereignty. It has to do with the rights of individual citizens of the United States and organizations within the United States, governmental and otherwise, to seek a redress of grievances in the courts of the States of the United States and in the United States courts when they allege that some wrong has been done to them.

It is interesting with respect to this taxation that we are faced with the situation here today in which the Supreme Court of the United States has repeatedly ruled that transaction taxes on transactions conducted by Indian business enterprises with non-Indians are subject to State taxation.

Ironically enough, one of those cases was one I argued in the U.S. Supreme Court and it arose out of a lawsuit against the State of Washington by an Indian tribe. The sovereignty of the State of Washington was not implicated by the fact that an Indian tribe could take it into a Federal court and make a claim that those taxes were not collectible.

The Supreme Court rejected that claim. It said, in fact, those taxes were collectible, were appropriately collectible, and yet although that case is now 18 years old, the Indian tribes in the State of Washington have consistently and for that entire period of time refused to collect the tax which the Supreme Court of the United States has said was due and owing and to turn it over to the State of Washington.

This year, our State Department of Revenue estimates that will cost the State treasury some $64 million, no small amount, $64 million in selling cheap cigarettes, cheap cigarettes, Mr. Chairman, something that it seems to me is now the national priority to avoid, encouraging a greater degree of smoking, competing unfairly with non-Indian enterprises, and depriving the State treasury of money that it uses for schools and for other purposes, of which the members of those Indian tribes are full and complete beneficiaries as they are citizens of the State of Washington.

The Supreme Court has dealt with this question of tribal immunity. At least one member of the Supreme Court of the United States would remove that immunity by judicial fiat, said that it is such an anachronism that it impinges on potentially the constitutional rights of other citizens of the United States.

The majority of the Supreme Court, however, has stated explicitly that this is an issue with which the Congress should deal. This is an issue with which the Congress should deal. The Supreme Court makes it very clear that Congress has plenary rights in this field as it is dealing with domestic dependent sovereigns.

Is it necessary for a governmental body to be free from litigation in order to carryout its governmental functions? If so, the United States of America is no longer sovereign because on a wide range of issues, it can be sued. If so, no State is sovereign; no local government has appropriate governmental bodies. If a local governmental body or a State commits a tort or breaches a contract, it can be taken into court.

This bill asks no more and no less than that Indian tribes be subjected to the same degree of responsibilities as others are. They should not be able to evade taxation which is due and owing.

They should be able to contest whether or not the tax is due and owing and I want to emphasize that nothing in this bill changes the substantive law relating to the relationships between Indians and non-Indians or between Indian tribal governments and non-Indian governments or non-Indian individuals. It doesn't change the law at all. It simply gives the courts, the States and the United States the right to make a determination as to what that law is in a given case.

The most fundamental elements of our constitutional doctrines are the rights of due process and equal protection. In controversies with Indian tribes, non-Indians and State governments and local governments are denied the due process of law and are denied the equal protection of the laws because they cannot vindicate them in neutral courts representing all of the people of the United States.

The *Montana* case cited by Senator Inouye is totally irrelevant to this controversy. This bill, if it's passed, will not remove any jurisdiction Indian tribes may have over lands on the reservation, any ability they may have to impose taxes on those reservations.

What it will do is say that if someone disagrees with the exercise of those rights, that person has the ability to go into a court and find out whether or not the exercise of those rights by the tribe is in accordance with the laws of the United States but the substantive relationships will not be affected by this law at all.

I find it astounding that in the last decade of the 20th century, there should be governmental bodies in the United States who claim the right to be able to run other people, to be able to violate decisions of the Supreme Court of the United States, and to do so with impunity. It is astounding that any government should make such a claim and claim to be a part of the democratic system here in the United States.

The CHAIRMAN. We will go ahead and proceed with our first two people to testify. That will be Ernest Istook, a member of Congress from Oklahoma and second, Ray LaHood, a member of Congress from Illinois.

Congressman Istook, if you'd like to proceed.

STATEMENT OF HON. ERNEST J. ISTOOK, JR., U.S. REPRESENTATIVE FROM OKLAHOMA

Mr. ISTOOK. Thank you very much, Chairman Campbell, Senator Inouye and Senator Gorton.

I'm very pleased to have the opportunity to testify before your committee this morning to discuss one of the problems that not only relates to jurisdiction, but relates to public safety, to our transportation system, and certainly as Senator Gorton has indicated, to equal protection of the laws because I think that is a goal to which we all aspire and when we find that it is lacking, we certainly all wish to correct it.

For 2 years in the House, Congressman Pete Visclosky of Indiana and I have been working together to ensure that the tax networks of State and local governments are protected from unscrupulous businesses which are refusing to collect the proper sales and excise taxes and we also have as our goal to try to encourage fair competition between Indian and non-Indian businesses.

Our efforts have not been and will not be to try to limit the abilities of tribal governments which have tax agreements with their neighbors. We certainly have every desire to assist in stimulating the development of Indian businesses and the efforts by the tribes, but to do so on a fair and equal footing.

We've based our efforts, of course, on rulings of the U.S. Supreme Court which has evaluated the treaties signed by the Federal Government and the Indian tribes, as well as the underlying system of Federal laws which have been enacted. I find that there are certain myths that abound.

Frequently I hear people assert that Congress cannot clear up the problems because of Indian treaties or because of what some people assert to be sovereign rights of Indian tribes. That is not what the U.S. Supreme Court has ruled. The standards are very, very clear.

As you know, I'm sure, the Supreme Court has ruled that Indian tribal members are exempt when they are dealing with a tribal business from State and local sales and excise taxes but that non-tribal members who are purchasing items through these tribal businesses or on Indian trust lands are not exempt from those taxes. So the tribe's taxing authority extends over its tribal members but it cannot undo the taxing authority of the State government or the local government where the business may be situated when they are conducting business activities with persons who are not members of the Indian tribe.

The Supreme Court has ruled that States have the right to assess taxes on sales to non-Indians, but the right has been meaningless when tribal businesses cannot be required to collect the taxes on non-tribal sales as must be done by other businesses. So as the Supreme Court makes clear, the exemption is very, very limited and applies only to sales to tribal members through a tribal business.

Unfortunately, through making claims to the contrary which are often pronounced in public statements and mislead people, frankly, some tribes have been exploiting their exemption leading non-tribal purchasers to believe that they don't owe the sales, fuel, tax or the excise tax because the tribes are not charging them. The steep discount that results when they don't apply the tax is a powerful lure to attract customers to come and to leave their normal business relations with non-tribal businesses. It's a very simple phenomena.

All of us have seen a situation where we go to an intersection, there are two or more gas stations or convenience stores selling gasoline and we look at the prices. If one has a differential that is significantly below the other, we take our business there. It is a business that is very, very responsive to pricing.

Thus, the tribes can sell gasoline without charging the typical State fuel tax of 20 to 30 cents a gallon or the typical State cigarette tax of 40 to 60 cents a pack. This drives legitimate taxpaying competition out of business for miles around. That's the first problem.

The second problem is it destroys the tax base, the tax base that creates the network of roads on which we, Indians and non-Indians, drive which creates the network of schools, which creates the network of public safety, of health care systems. All of these things

are dependent upon the very State and local taxes which are being evaded by the customers of the tribal businesses and with the complicity—in fact, the encouragement of certain tribes themselves.

The problem is getting worse. The loss that Senator Gorton has mentioned to multiple States is extraordinary and it's growing larger because the Federal Government keeps enabling tribes to have better business locations, not because the land is historically part of any tribal land or land that once was part of the tribe, but simply because it has a prime location for purposes of business. The effect is to create a patchwork quilt of where we may have the tribal trust lands.

Congress has created the difficulty as the court decisions make abundantly clear and the answer must also come from the Congress itself. We would not sit still if the government of a foreign nation—Canada, France, China—through some of the businesses with which they are affiliated came into the United States, established local businesses and said, we are not going to collect the State and local taxes that are ordinarily collected.

We wouldn't see fit, we wouldn't stand still for any argument that says, well, they're a different government, therefore, our laws don't apply. The U.S. Supreme Court has made it clear the laws do apply. Congress needs to enable the laws to be enforced in an equal manner with equal protection of the laws so that tribal businesses and those with whom they compete have certainty and they don't have an advantage that comes from tax evasion, but they have an advantage that comes from their own initiatives, their own business acumen, and their own efforts. Congress needs to act to end this practice of marketing tax evasion.

Certainly I commend Senator Gorton and I commend Mr. LaHood and the other members of the House who have been working on this issue also.

I thank you, Mr. Chairman, for the chance to testify with you this morning.

[Prepared statement of Mr. Istook appears in appendix.]

The CHAIRMAN. I thank you for your appearance. Were you going to stay for a few moments?

Mr. ISTOOK. Yes, sir; I will.

The CHAIRMAN. Congressman LaHood, if you'd like to proceed?

STATEMENT OF HON. RAY LAHOOD, U.S. REPRESENTATIVE FROM ILLINOIS

Mr. LAHOOD. Thank you, Chairman Campbell, Senator Inouye, and Senator Gorton.

Thank you very much for the opportunity. It is a privilege and an honor to be here today.

I have come here to speak about an issue that I believe is very important to our Native American tribes, our States and to our transportation policy, the collection of motor fuel taxes on Native American lands.

As a member of the House Transportation and Infrastructure Committee, I know firsthand how important the gas tax is to the maintenance and construction of our vast infrastructure system. The gas tax, as I'm sure you are aware, directly supports the efforts of State and Federal Government in building and repairing

our Nation's roads and bridges. In order for our States to play their role in the transportation system, they need to be sure they are collecting all of the motor fuel taxes.

Unfortunately, that is not currently the case. Currently, some Native American tribes do not always collect and remit gas tax receipts to the appropriate State government. This practice has cost the States a significant amount of revenue that could have been used to pay to improve roads and bridges.

Lost revenue estimates for some States are in the millions. It is estimated that Oklahoma, alone, lost roughly $13 million in motor fuel tax receipts for fiscal year 1996. Many other States are also adversely affected, including the States of Washington, Oregon, Idaho, New Mexico, Kansas, Michigan, and New York.

I believe this problem of unremitted and uncollected gas taxes should be addressed and I plan to offer a bill shortly that will address this problem, and I will keep a very close eye on what happens here in the Senate.

My plan would prohibit the Secretary of Transportation from allocating funds for public land highways on Indian lands and reservations unless either the Indian tribe had entered into a written agreement with the State in which the highway is located and provides procedures for the payment and collection motor fuel taxes that are sold to non-Native Americans by a retail establishment that is located on such land, or the Indian tribe refuses to enter into a written agreement but the allocation of the funds is essential to the construction and maintenance of a highway or road that is a critical component of the National Highway System.

These provisions would take effect six months after the date of enactment of such a plan in order to allow tribes and the States some time to negotiate agreements.

I do want to stress the aim of this plan is to ensure that non-Native Americans pay and are assessed the gas tax. This plan is not intended to infringe on tribal sovereignty. Rather, it is meant to encourage the tribes to work cooperatively with the States in order to formulate a mutually agreeable compact on the subject of motor fuel taxation.

I'm firmly convinced that this approach would yield numerous benefits. First, it would help ensure that States have adequate funds for road maintenance and construction. Secondly, it would end an inherent unfairness posed by the sale of tax-free fuel on Native American lands. Third, it would preserve jobs and keep businesses open. The current situation heavily impacts petroleum retailers.

Many purchasers or motor fuel, both gasoline and diesel, are likely to travel to Indian lands because they know they can avoid paying State and local motor fuel taxes. The motive to do this can be great for many drivers. In fact, in some States, the tax on gasoline can be as high as 34 cents per gallon and 28 cents per gallons for diesel.

The sale of tax-free fuel poses serious concerns for retailers who must pay the tax and who are located within a reasonable distance of Indian reservations because the Native American tribal establishments, by selling gas at lower prices without the tax, have the

potential to put countless numbers of establishments out of business.

For example, avoiding the tax on diesel fuel for a typical truck with a 250-gallon tank can mean savings of $70-plus, a sufficiently large amount to justify a trucker to travel to Native American lands to refuel his or her truck. At the very least, a trucker could plan or time his or her routes to ensure they purchase tax-free fuel on Native American lands.

I believe these arguments, because of their impact on road maintenance and construction, and on the Highway Trust Fund, more than justifies the scrutiny by this committee into this matter. I look forward to working with this committee and any others who are interested in this subject.

Again, I thank you very much.

[Prepared statement of Mr. LaHood appears in appendix.]

The CHAIRMAN. Thank you both for appearing. I have just a couple of questions.

Just looking through your testimony, Congressman Istook, on page 2, you list a number of States who have lost revenue. There's a good number, it lists a bunch of them. I don't notice where those statistics came from? Did you research each State to get those statistics?

Mr. ISTOOK. We have information that we've received from the tax-collecting agencies and various State tax commissions. The reason that we don't have an overall national figure is we don't have a full compilation from all of the States. That is why we have limited this information to those States from which we have received that information.

Certainly my staff will be happy to share with yours the specifics of how those particular figures were compiled.

The CHAIRMAN. If you would share that with the committee, I would appreciate it.

Mr. ISTOOK. Yes, sir.

The CHAIRMAN. Congressman LaHood, let me ask you just one thing. There are a number of compacts in Indian country dealing with all kinds of things from gaming to taxation. I understand, as an example, there are 18 compacts in the State of Washington alone between the State and tribes dealing with the cigarette tax.

I happen to be a big states rights guy and a local government guy and I'm sure you both are too. To my knowledge, there is nothing in the courts or in legislation now that prevents tribes and States from entering into compacts dealing with taxation. I guess I should ask you what would be the benefit of trying to force through Federal legislation if that opportunity already exists? Shouldn't we rather encourage States and tribes to enter compacts to deal with the inequity in taxation?

Mr. LAHOOD. I certainly would have no problem with that. I think the dilemma is the issue I've tried to highlight is the fact that we collect the gasoline tax, which goes into the highway trust funds. We would have the impetus at that point to try to have States and tribes enter into these contracts.

I would agree with you there is nothing that would prohibit them from doing it, but what I would say is that I think we have a little bit of a hammer here at the Washington, DC level, at the Federal

level, to maybe try and encourage this where encouragement has not been given in the past.

Mr. ISTOOK. If I may, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. ISTOOK. As we understand it, approximately one-fifth of tribes actually have compacts with the States on all fronts. It's a little misleading. It may not be one-fifth of the tribes, but it's one-fifth of the possible compacts because you have different types of taxes.

The difficulty is because of the inaction by Congress, there is no incentive for the tribes to enter into a compact if they can thumb their nose at the State law and there is no consequence for them, why then should they enter into a compact?

I believe, and it's been my approach in legislation, that the tribes should either be complying with the State law and collecting the taxes or have some agreement with the State which may impose a lesser burden upon them, but right now, there is simply no incentive, there is an imbalance of negotiating power because Federal law gives no enforcement mechanism to the States and the tax evasion continues. Even though it's not tax avoidance, the U.S. Supreme Court said it's tax evasion.

The CHAIRMAN. Thank you.

Senator Inouye, did you have any comments or questions?

Senator INOUYE. I just have a question. Would it be proper for the U.S. Government to tax the District of Columbia on its lottery income?

Mr. ISTOOK. If that question is proposed to me, we are not seeking to have lottery income in Washington, DC taxed. We could talk about whether that involves interstate commerce and whether it's a proper subject of Federal taxation, or whether you could single out the District of Columbia as opposed to any other jurisdiction, but I'm not proposing any such thing there. I don't think anyone is proposing a tax on the Indian tribes.

It's very clear, in legislation certainly that I've sponsored, that we are only talking about collecting the taxes which the U.S. Supreme Court has ruled are due and are owing by the non-tribal members who are doing business with the tribal businesses.

Senator INOUYE. Do you think it would be proper for the U.S. Government to tax the State of Nevada for gaming income?

Mr. ISTOOK. No; I don't think if the tax were on gaming income, and I don't think that we're talking here about any sort of income tax. I don't think anyone has proposed an income tax on the income of Indian tribes. All we've talked about is having individuals who deal with the tribe pay the same taxes they would be paying if they were dealing with a non-tribal business and buying gasoline, cigarettes, or whatever it may be.

Senator INOUYE. Does your bill call for the taxation of commercial or retail sales?

Mr. ISTOOK. It does not create any taxes of that. It says only that the existing State laws for payment of fuel or excise or sales taxes on retail transactions should be collected by the Indian tribe on their transactions with non-tribal members. So it only calls for the ability to enforce those existing laws under the guidelines established by the Supreme Court.

Senator INOUYE. Thank you.

The CHAIRMAN. Senator Gorton.

Senator GORTON. No questions.

The CHAIRMAN. If I might just ask one thing. This committee deals with Indian gaming, as you know. Last year, there was a decision—I guess 1½ years ago—called *Seminole* v. *Florida* in which the courts held that States do not have to, in fact, negotiate in good faith with the tribes on reaching a compact with gaming.

If you flip over that coin, what I'm understanding from listening to you is that tribes should have to come to the table, there should be legislation that requires them to come to the table and reach a compact but doesn't that fly in the face of what the courts have already held for the States, that they don't have to?

Mr. ISTOOK. No; and I think the distinction here, Senator, is the difference between when you're talking about gaming and when you're talking about cigarette taxes, gasoline taxes and so forth. No one needs a compact with a State Government to establish a convenience store, or a gas station. That's already permitted by law. Therefore, if you want to go into that business, you can just establish the business. The question then is whether you will comply with the law to the same extent as anyone else and collect the tax from your customers and then remit it to the State taxing authority.

The difference between that and gaming is that in the case of gaming, there are multiple state laws regarding gambling, you can't even get into that business period under most circumstances in most States. There you're asking a tribe to compact before seeking to set up a business that normally could not be established in that particular State. Therefore, you have a very different situation on whether a compact is necessary or not.

The CHAIRMAN. Congressman LaHood, did I understand you to say you are introducing a bill that would require the collection of taxes?

Mr. LAHOOD. There would be an opportunity for tribes to enter into agreements with States.

The CHAIRMAN. It would primarily deal with sales of gasoline and cigarettes?

Mr. LAHOOD. That's correct.

The CHAIRMAN. Would it have any effect on, for instance, profits from casinos or other things that are not sales related?

Mr. LAHOOD. No, sir; my bill deals with the issue of the collection of the gasoline tax and/or the lack thereof and the impact that has had on States, particularly in their ability to deal with transportation and infrastructure.

The CHAIRMAN. If there are no further questions, I appreciate both of you coming today.

I know your testimony was more extensive in its written form than you had time for, but that will be included in the record.

Mr. ISTOOK. Thank you.

The CHAIRMAN. We will now go to the first panel. That will be Derril B. Jordan, Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior and Thomas LeClaire, Director, Office of Tribal Justice, U.S. Justice Department.

We will take you in that order. If Derril will start first, then we will go on to Tom.

STATEMENT OF DERRIL B. JORDAN, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY MICHAEL ANDERSON, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS

Mr. JORDAN. Mr. Chairman and members of the committee, thank for your the opportunity to testify today on the principle of tribal sovereign immunity and say that we welcome this hearing this morning and hearings that are yet to come. We believe the Senate and everyone involved in this issue needs as much information as possible before considering waiving tribal sovereign immunity in the courts of other governments.

As several of the Senators have already mentioned this morning, tribes are sovereign governments and have been recognized by the United States since the earliest days of our Nation. This Congress, the Supreme Court and the other courts of our country have also long recognized that sovereign immunity is an attribute of tribal sovereignty in the same way that it is an attribute of the sovereignty of other governments within our system.

The question that is now before Congress is whether or not Congress will abandon its support for tribal self-government and tribal sovereignty by seeking to unilaterally eliminate or diminish tribal sovereign immunity.

We are aware of no comprehensive studies that have compared the exercise of tribal sovereign immunity by tribes on one hand versus the exercise of sovereign immunity by the State and Federal Governments on the other hand. Yet, proponents of the measures to waive tribal sovereign immunity continue to rely on what we believe are a set of invalid assumptions.

Those assumptions are that tribes always exert their sovereign immunity, never waive it, on one hand, and that the States and Federal Government always waive and never exercise their sovereign immunity on the other. We believe those assumptions are unfounded because, on the one hand, it under estimates the degree to which the Federal Government and the State governments exercise their immunity and it overestimates the degree to which tribes utilize their immunity in defending lawsuits.

Tribes frequently waive their sovereign immunity, both in tribal codes and statutes, through water rights agreements that are approved by this Congress, through business contracts, insurance riders and subordinate entities.

Even if a comprehensive study were conducted that demonstrated there is indeed a difference between the degree and frequency with which tribes waive their immunity or exert their immunity on one hand versus the Federal and State governments on the other, we don't think that alone is enough to justify unilaterally waiving tribal sovereign immunity in the courts of other governments. That's because we believe it is necessary to, first of all, understand the circumstances and the environment in which tribal governments exist and operate.

This committee is certainly well aware of the conditions on Indian reservations, the physical infrastructure that is either com-

pletely lacking or woefully inadequate, the health conditions on reservations that are far below the health conditions of the rest of the population in our country, the high rates of unemployment and the attendant substance abuse problems—alcohol, drugs—and high suicide rates that exist on Indian reservations.

These are real problems that confront tribal governments that demand tribal governments to provide services to their people, to provide economic opportunity and to help people and families in distress. These services cost money. Tribes do not have near the wherewithal and the means to raise governmental revenues that the Federal and State governments have.

One should not be alarmed or surprised to find that in fact tribal governments may be, understandably, more reluctant to waive their immunity, scared to do so because of what it will mean to tribal government. In fact, I think it's safe to say that without the ability to raise sovereign immunity, most tribal governments would cease to be able to exist to provide services to their people.

With regard to the issue of taxation, tribal-State tax disputes, the Department believes it would be fundamentally unfair at this time to waive tribal sovereign immunity at a time when the Supreme Court has been reinforcing the immunity of the States. Right now with mutual immunity that exists, both the tribes and States are immune to suit. This encourages tribes and States to deal with each other as mutual sovereigns and to work together to solve their problems.

Nobody has an upper hand in these negotiations because nobody can walk away from the table and take the other party to court. Both parties must stay there and try to find a way to reach mutually satisfactory solutions.

If tribal sovereign immunity is waived, we believe that will remove the incentive of many States, maybe not all but many States, to deal with tribes on a sovereign-to-sovereign basis.

With regard to contractual disputes, again, we do not believe it is necessary for Congress to enter into this area. Because of hearings like this one, the hearing in 1995, and the many Supreme Court cases and other cases, both at the Federal, State and also the tribal levels, any party seeking to do business with an Indian tribe is well aware of the immunity of tribes and has an ample opportunity to negotiate for a waiver to protect its interest.

Let me conclude by thanking the committee for the opportunity to testify this morning. I certainly would be happy to answer any of your questions.

[Prepared statement of Mr. Jordan appears in appendix.]

Mr. ANDERSON. Mr. Chairman, with your indulgence, may I spend just a few minutes?

The CHAIRMAN. Please identify yourself for the record.

Mr. ANDERSON. Michael Anderson, Deputy Assistant Secretary for Indian Affairs, Department of the Interior.

I just wanted to respond to Senator Gorton's comments that he made on our written record but also to talk a little bit about some of the comments made this morning.

First, Mr. Chairman, you announced at the start of this hearing that if there is a problem, Congress should take action. I think

that's a very critical statement because at this time, we've not been shown there is a problem that requires a congressional solution.

We mentioned the State taxation agreements and I think it should be clear on the record that Congress should only make decisions if there truly is a problem, which has not been identified yet. The hearings in Minnesota and Washington State, we will certainly follow with interest, but at least at the Department, we've not seen there is a problem that requires a congressional solution.

Second, you mentioned accommodation and certainly there are non-Federal solutions that could lead to accommodation whether it's explaining to tribes they have Federal tort claim remedies for people who are injured on the reservation through Federal lawsuits against the Federal Government, and also the insurance mechanisms if it's at a lower cost that may give them the ability to waive their sovereign immunity. So there are certainly non-Federal solutions here as well.

I also wanted to note with regard to Senator Gorton's statement that Indian tribes are claiming the right to wrong other people, we've certainly heard no Indian tribes making that claim. Certainly, that should not be confused with the ability of tribes to assert sovereign immunity, but I don't think anyone in this audience of tribal leaders or others is saying we claim the right to wrong other people. It's simply not something that is asserted or done.

Congressman Istook also mentioned this morning that States are losing millions of dollars. When we first heard that claim last year during some of the rider amendments, we were very concerned about those figures and called tax revenue agents and also the Bureau of Alcohol, Tobacco and Firearms to see are these figures really accurate.

What the tax revenue agents have done in the States is said, how much are Indians selling to Indians and non-Indians and what's the calculation if the States could tax on those reservations? Those figures were far out of line to actually what the States could collect.

Of course the States always have the remedy of precollection, so that's something the Supreme Court has affirmed. So I think there are many non-Federal solutions here that if actively supported by the Congress, by the tribes, by State governments as well, could help find a solution to this issue.

Thank you.

The CHAIRMAN. Tom.

STATEMENT OF THOMAS LECLAIRE, DIRECTOR, OFFICE OF TRIBAL JUSTICE, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY MARK VAN NORMAN, DEPUTY DIRECTOR, OFFICE OF TRIBAL JUSTICE

Mr. LECLAIRE. Good morning, Mr. Chairman. Good morning, Senator.

My name is Tom LeClaire. I'm the Director of the Office of Tribal Justice at the Department of Justice. Joining me here this morning is Mark Van Norman and he's Deputy Director in my office.

Congress and the executive branch acknowledge the importance of working with Indian tribes within the framework of government-to-government relations when tribal self-government, tribal land

and natural resources, or treaty rights are at issue. In our work within that framework, the Justice Department is guided by fundamental principles that have governed the relations between the United States and Indian tribes for over 200 years. The administration and the Attorney General honor the United States' commitments to Indian tribes.

Congress has recognized that the United States has a trust responsibility to Indian tribes that includes the protection of the sovereignty of each tribal government. Under the Federal trust responsibility to Indian tribes, the United States should exercise the highest standard of care in matters of tribal self-government.

Continued recognition of tribal sovereign immunity is an important part of the Federal Government's protection of tribal self-government, which furthers the United States' longstanding policy of encouraging Indian self-determination and economic development.

Sovereign immunity is a fundamental aspect of sovereignty which protects a government from suit to avoid undue intrusion on governmental functions or depletion of the government's treasury without legislative consent. Congress carefully considers any waiver of Federal sovereign immunity, mindful of potential impacts on Federal governmental functions and our treasury.

As to States, the 11th amendment to the Constitution of the United States embodies the principle of sovereign immunity and protects the dignity and respect afforded to the States in our Federalist system. States routinely rely on their sovereign immunity to bar suits to which they do not consent and have done so to bar suits by Indian tribes before the U.S. Supreme Court in three cases within the past 10 years.

States normally reserve sovereign immunity to protect discretionary government functions from suit. States also frequently limit government liability from monetary damages and bar recovery for exemplary and punitive damages.

Indian tribes are sovereigns that predate the formation of the United States. Accordingly, absent tribal government waiver or congressional abrogation, Indian tribes retain sovereign immunity as an aspect of inherent tribal sovereignty.

Congress has acted to protect tribal sovereign immunity and has provided appropriate venues for dispute resolution that do not jeopardize tribal government functions or financial solvency such as the Indian Self-Determination and Education Assistance Act [ISDEAA], which extends Federal Tort Claims Act coverage to claims against Indian tribes acting under ISDEAA contract. The ISDEAA preserves tribal sovereign immunity while providing mechanisms for compensating injured parties.

In our view, the longstanding Federal recognition of tribal sovereign immunity does not raise significant policy concerns in the area of contract claims. The doctrine of tribal sovereign immunity is well known and an Indian tribe's immunity from suit does not leave a potential commercial partner unable to protect its interest. I have listed a number of those protective mechanisms in my written testimony.

In the area of tort claims, the Department of the Interior informs us that Indian tribes have obtained automobile, property owner's, and general liability insurance to ensure against tort claims by in-

dividuals. The ISDEAA extension of Federal Tort Claims Act coverage for certain claims against Indian tribes arising out of performance of those contracts provides further protection. In our written testimony, we have suggested a framework for making insurance coverage accessible while protecting tribal governmental functions.

Indian tribes or reservation Indians are subject to tribal law and accordingly, are generally exempt from State taxation and regulation in Indian country. When Indian tribes or individual Indians generate value through economic activities within their reservations, Federal law may also preempt State taxation of non-Indians engaging in commerce with them. In contrast, under prevailing Supreme Court rulings where Indian tribes or individual tribal retailers market prepackaged goods to non-Indian without adding reservation value, the non-Indian consumers may be liable to pay nondiscriminatory State taxes on the transaction.

The Supreme Court has recognized that States and Indian tribes may enter mutually satisfactory tax agreements and to avoid undue burdens on commerce and facilitate tax collection. Seventeen States have entered into such tax agreements with Indian tribes. In our view, such agreements are the best mechanisms for mutually satisfactory resolution of tax collection issues between States and tribes.

Thus, we concur with the Interior Department, legislative waiver of tribal sovereign immunity in this area is unwanted.

The Interior Department informs us that Indian tribes frequently enact their own waivers of sovereign immunity and like the Federal and State governments, Indians would limit their waivers of sovereign immunity to tribal courts.

Tribal courts are central institutions of self-government because they are important forums for ensuring public health and safety and for adjudicating disputes affecting personal and property rights in Indian country. Tribal courts give life to tradition and values embodied in tribal law and are essential to the political integrity, culture and identity of tribes.

That's why we continue to work cooperatively with the Department of Interior in trying to increase funding to those fundamental institutions and increase training opportunities for the personnel involved in tribal courts.

In conclusion, the Justice Department respectfully suggests that to the greatest extent practicable, legislation dealing with tribal sovereign immunity should be developed based on consultation and consensus with Indian tribes. In our view, legislation in this area should preserve tribal governmental solvency, authority and functions, including tribal court authority and tribal sovereign immunity.

Thank you, Mr. Chairman.

[Prepared statement of Mr. LeClaire appears in appendix.]

The CHAIRMAN. Thank you.

I want to share something with you. I think I'm the only member in the U.S. Congress that actually lives on a reservation within the boundaries of the reservation in Colorado, so I'm very well aware of the problems that Indian people face with education and high

school dropouts, alcoholism and all the rest and I'm a supporter of the sovereign immunity issue.

There is some things going on out there in Indian country that I think really are driving this bill and these hearings. I might mention one. We won't get involved in it because it's in the courts, but I wanted to tell you about it.

In a court case going on now between Amoco and the owners of some individual properties within the reservation I live on—it's checkerboarded like some are in the United States—recently courts held that the tribe owns all of the coalbed methane gas because it's a property of coal. In that appellate court, it was a three-person decision that overturned a lower court. I see you nodding, so I'm sure you're aware of it.

Whether the courts are right or wrong, they're going to review that, the full court is, I can tell you when we deal with taxation and talk about potential backlash and what happens, this is what happened in that case where it is now.

The county, LaPlata County of Colorado, collects about one-fifth of all the revenue from the taxes that are now levied on the non-Indian owners of those natural gas wells within the boundaries of the reservation. They're on private property and bought pieces years ago.

Some of those people built homes based on the ability to pay back the banks for the house. All of those royalties have now been put in escrow and held up by Amoco until the final court decision is made about who owns the gas.

The first thing that happens if the courts do not reverse their decision somewhere along the line is that the county will lose about one-fifth of all its revenue. So they've already said what they are probably going to do, if they lose it, is raise the property taxes on the very people that are going to lose their homes. Meanwhile, the tribe will not have to pay any taxes at all on those revenues the court is holding for them.

I'm not really taking sides in this but I can tell you it's one of the things that has kind of created a backlash and the question of why we're here today. I don't know if you read the newspapers this week but the New York Times, the LA Times, Rocky Mountain News, USA Today, all had front page stories this last week dealing with tribal sovereignty and partly about taxation.

So regardless of what side you're on in this thing, when you say there is really no problem and it's not hurting people, I can tell you that I know some people that are hurt. We can go back in history and discuss a lot of things about who was wrong and who got hurt, but what we're faced with right now I think are some things that are clearly going to fly in the face of nobody getting hurt and no problem.

There is a problem. If nothing else, it's with the perception that all people aren't being treated equal and that's why we're here.

I wanted to pass that on to you and if you haven't looked up that case or watched it, they tell me that will set a precedent for literally all natural gas in the United States that's being drilled within the boundaries of the reservations no matter who owns it. It may be a major decision dealing with hundreds of billions of dollars

over the long run. Either way, somebody is going to get hurt in that court decision. I'm absolutely convinced of it.

Mr. JORDAN. If you don't mind, I'd like to respond to that. We are very much aware of that case.

First of all, it doesn't involve taxation. It's not a case involving the tribe trying to tax anybody. This is a tribe claiming ownership of the coalbed methane gas.

The CHAIRMAN. That's right. It really involves the loss of taxes from the other side of the equation.

Mr. JORDAN. And the other thing is these are Federal courts that are making these decisions. Clearly, as you noted, someone is going to get hurt, but it's not because of sovereign immunity, it's not because there's a tribal court involved that's not providing someone with a fair hearing and an opportunity for due process and so forth.

The CHAIRMAN. That's true. Nobody is denying that or said there's not an opportunity for due process. What I was really getting to was the potential backlash that drives bills like this.

Mr. ANDERSON. The comment I was making is that sovereign immunity and the waiver wouldn't solve that situation. Certainly there are consequences from however that case is resolved. This is an interpretation of the Federal Reserve rights when the Federal Government transferred it to the tribe, how much was the coal methane reserved or not. Say the tribe is correct, that means they've lost the benefit for 67 years of revenues.

The CHAIRMAN. So they've been hurt already because they've lost years and years of what that revenue would have been. If you tell that to a non-Indian who is losing her home, if you think they're going to be understanding about it, you're wrong. It's a terrific backlash building in Indian country because of things like that.

I'm not trying to say who is right and who is wrong because I know both sides have been hurt in the history of the United States.

Senator Gorton, did you have any comments or questions?

Senator GORTON. Yes; Mr. Jordan has taken me straight back to law school and the marvels of the sometimes brutal implications of the common law.

He tells us any two parties seeking to do business with the tribe, the concept of caveat emptor should prevail. Mr. Chairman, caveat emptor is Latin for let the buyer beware. The old situation is if you got defrauded in the contract, tough. That's very interesting.

Would you tell me what other areas of the law Mr. Jordan, you think the caveat of caveat emptor should apply?

Mr. JORDAN. The issues with which we're dealing today, I think particularly with regard to contracts.

Senator GORTON. My question was, as a lawyer, are there some others? Should caveat emptor apply when the State signs a contract with an individual; should it apply between individual citizens, or is it only Indian tribes that should benefit from the doctrine of caveat emptor?

Mr. JORDAN. I think it generally applies within the area of commercial dealings. I have a case before me——

Senator GORTON. You do? You think that caveat emptor generally applies in commercial transactions?

Mr. JORDAN. There may be some judicially and statutorily carved out exemptions to that, but generally, it applies. If you'll let me an-

swer, I have a case here that was given to me yesterday. The name of the case is *Federal Sign* v. *Texas Southern University*. I haven't had a chance to read it but poked through it quickly last night.

It's a decision decided June 20, 1997 by the Supreme Court of the State of Texas. Let me read you one passage of this case.

Sovereign immunity embraces two principles—immunity from suit and immunity from liability. First, the State retains immunity from suit without legislative consent, even if the State's liability is not disputed.

Senator GORTON. Mr. Jordan, with all respect, I asked you whether or not there were other transactions except those Indians in which the doctrine of caveat emptor should apply?

Mr. JORDAN. I think I answered you that generally, within the realm of commercial dealings.

Senator GORTON. I'll accept that as your understanding of the law.

Mr. LeClaire, Is the position of your department that not only does the doctrine of sovereign immunity protect Indian tribes from any kind of lawsuits by the States in which they are located or individuals in the States with respect to on the reservation Indians, but it's the administration's view it should apply to businesses run by Indians off-reservation as well. Is that the thrust of the position of the United States in *Kiowa Tribe* v. *Manufacturing Technologies?*

Mr. LECLAIRE. I think our position in *Kiowa* reflects the reality that much of the commerce that occurs involving Indians occurs both on and off the reservation, particularly when dealing with contractual relations.

It would be our position that when the tribe acts in its sovereign capacity, in such acts the doctrine of sovereign immunity applies. What we've said is that in dealing with commercial arrangement, the parties, being on notice that sovereign immunity is an issue, can make other arrangements to deal with that and protect each other's interests.

Senator GORTON. You regard the conduct of business enterprises and competition of private enterprises as an exercise of sovereignty when they're conducted by the tribe?

Mr. LECLAIRE. When they're conducted by the tribe as a tribal government.

Senator GORTON. So the Government of the United States believes it should apply off-reservation as well as on-reservation?

Mr. LECLAIRE. When it's in the capacity you've outlined, yes.

Senator GORTON. If this bill were cast in a form of saying that tribal sovereign immunity is waived by the tribes in the courts of the United States to the same extent that the United States itself has waived sovereign immunity and in the courts of the various States to the same extent that the States have waived their sovereign immunity, would you then be in agreement with the bill?

Mr. JORDAN. With the 50 States, they are all over the board. There are some States like Texas that have essentially no waiver absent legislative enactment and others have standing waivers that require you to file certain administrative notices and so forth.

With regard to the United States, again, there are areas where the United States has waived its immunity and others where it has not. So it is pretty much across the board.

Again, to get back to my opening statement, when you look at the realities of tribal government in terms of the needs that they have to meet and the available resources, it may not be appropriate that tribal immunity be waived to the extent the United States' immunity is waived.

The United States certainly and the States have much greater ability to defend lawsuits and also to pay judgments. The cost of defending an action on the basis of sovereign immunity alone, just filing motions to dismiss, can cost a tribe hundreds of thousands of dollars.

I, as a former tribal attorney, have seen the bills at both ends. I've generated them and I've seen them come in the door. It can be very expensive just to defend these lawsuits.

Senator GORTON. So sovereign immunity ought to be more available for poor governments than for wealthy governments. That would be appropriate for the State to say small towns and the ones without a big tax base ought to have sovereign immunity?

Mr. JORDAN. I can't speak to the issue of towns because I think in different States, municipalities enjoy different levels of immunity, but with regard to the States, each of the 50 States has made its own choice.

Senator GORTON. Let's put it the other way. Should we then waive sovereign immunity for those Indian tribes that are now wealthy?

Mr. JORDAN. There are probably a few that I guess one might qualify as wealthy, but again, I think if you compare resources to need, I don't think there is any question——

Senator GORTON. Would it be okay to waive sovereign immunity?

Mr. JORDAN. I think just like the States have the right to waive their immunity and make those decisions for themselves, I think in the spirit of the policies of this Congress and this Administration of self-government and self-determination, that tribes ought to be free to choose to what degree they will waive their immunity.

Senator GORTON. While one has to refresh one's memory after a number of years, I have here the Supreme Court's decision in the *Colville* case. In that case, the tribe and the United States of America sued the State of Washington successively in lower court, but in fact, the State of Washington was the defendant in that case.

The State of Washington was asserting the right to require Indian cigarette sellers to purchase and affix on the cigarette packages they sold to non-Indians, State tax stamps. The Supreme Court of the United States affirmed the right of the State of Washington in that case that these transactions were taxable.

I think you described the holding rather disingenuously in your statement that they allowed us to tax the State of Washington to impose requirements on the Indian tribes. For 18 years now, the Indian tribes have refused to abide by that decision of the Supreme Court and engage in purchasing those State tax stamps and affixing them to cigarettes.

The Supreme Court, quite evidently, determined that exemption from taxation under those circumstances was not an attribute of sovereignty, that it was an appropriate exercise of State responsibility. You still take the position that the State of Washington should not be permitted to sue the tribe, the owner of those busi-

ness enterprises to enforce an obligation which the Supreme Court of the United States has determined to be valid?

Mr. LECLAIRE. I think we take the position that what has worked the best has been when the two sovereigns have reached agreements. I understand in Washington, quite a few of the tribes have reached such an agreement.

Senator GORTON. The question is, you have a Supreme Court that says the State has this right. Your position is, the State should not be able to enforce that right, it should have to negotiate with it. It doesn't have to negotiate with me over whether I pay my taxes or you, but when the Supreme Court has stated that this is the law, your view is the State should not have the right to enforce that law, it should have to negotiate whether or not the other party wants to obey the law and the extent to which it wants to obey the law?

Mr. LECLAIRE. I think it's a question of where the tax falls. We agree the tax would apply, but there are diverse mechanisms to recover that tax. One of the ways that we have suggested is going through the wholesalers to ensure that the tax is paid.

If the point is for the State to ensure that the tax is paid, the question then becomes whether or not there is a mechanism to collect those taxes. The question becomes should that responsibility fall on the tribes or could there be another way that is less intrusive to collect those taxes.

We suggest that by imposing the tax at the wholesale level, the tax is collected and the tribe's immunity——

Senator GORTON. In 18 years, the State has found the only way it can enforce it is to find a spy someplace or another and seize the cigarettes as they are on the roads of the State. I suppose they probably catch maybe 2 percent in that fashion because the bonded wholesalers are outside of the State and you can't require a wholesaler in Idaho to put Washington State tax stamps on his cigarettes.

My frustration with your position is, here you have a case that your predecessors argued in the Supreme Court, you lost it. The Supreme Court said the State had the right to say to the seller on the Indian reservation, purchase and put the tax stamps on those cigarettes. They don't do it, they defy it. They defy the law. You say the State should not be able to enforce its tax laws in exactly the way it would enforce them against anyone else and the only way which is deemed to be effective, but they have to do it some other way. That's your view?

Mr. LECLAIRE. I think our view is that we would not ask the Congress to intervene and have a blanket waiver of sovereign immunity to accomplish a specific resolution of a problem in Washington that might be resolved by agreement.

Senator GORTON. It's a problem in more than one State. Would you allow it just for the purpose of cigarette taxes, sovereign immunity?

Mr. LECLAIRE. We would not support the notion of a blanket waiver of sovereign immunity when there are other resources available before we implement Federal legislation.

Senator GORTON. I understand his position, Mr. Chairman.

The CHAIRMAN. I'm not going to try and compare court cases with two attorneys, not that I have anything against attorneys. I'm really interested in trying to find an equitable solution for non-Indians and Indians.

Mr. Jordan, before the Federal Government takes land into trust on behalf of a tribe, is it required to consider the tax consequences of the decision?

Mr. JORDAN. Yes; it is under our regulations of 25 C.F.R., Part 151.

The CHAIRMAN. Would a broad waiver of tribal immunity require the Department to participate in defending a wider range in new areas? If we did waive tribal immunity, would that require the Department to participate in bigger, broader defense of a wider range of activities?

Mr. JORDAN. Yes; it would, if a tribe asked us to intervene or to defend them, yes, it would.

The CHAIRMAN. Tom, do you think State courts would be neutral forums?

Mr. LECLAIRE. I think the tribes do not necessarily consider the State courts to be neutral forums. There seems to be some distrust on both sides. As a policy matter, we think the tribal courts are institutions of tribal government. We've been supporting them, we've been trying to increase funding to those courts, and we believe they provide tribal governments with the best location for adjudicating disputes that occur within the boundaries of that tribal government.

The CHAIRMAN. Those are the only comments or questions I had. I appreciate you being here this morning.

We'll move along with panel two. First will be Judge R.A. Randall, Minnesota Court of Appeals, St. Paul, MN; Michael Harris, Attorney-at-Law from Tahlequah, OK; Scott Morrison, Attorney-at-Law from Wilburton, OK; Phillip Martin, Chief, Mississippi Band of Choctaw Indians; Ron Allen, President, National Congress of American Indians and Mark Jarboe, Dorsey and Whitney, LLP, Minneapolis, MN.

We will try to encourage you to limit yourself to this 5 minute rule and turn in all of your extended comments in writing for the record.

STATEMENT OF R.A. RANDALL, JUDGE, MINNESOTA STATE COURT OF APPEALS

Judge RANDALL. Thank you.

It is going to be difficult in the limited time available to even begin to go through the salient points that are needed in relation to Senator Gorton's proposed bill, contracts, taxes, the core issue, tribal immunity, tribal sovereignty, so we appreciate the chance to have forwarded things to the record first.

What I am to say and what I have submitted comes from two published opinions which have been widely circulated—*Cohen* v. *Little Six,* 543 N.W.2d, 376, 1996 and *Granite Valley Investors* v. *Jackpot Junction,* 559 N.W.2d, 135, 1997. Those are a part of the record. I would encourage those interested to read them in their entirety if that is possible.

I came here today with some friends and colleagues, Cherokee Attorney Michael Harris, Choctaw Attorney, Scott Morrison, and a friend, Rosie Burlinson to talk about why this presently held view of sovereignty with the inherent tribal immunity from suit has been turned on its head and deprives the people living within a reservation boundaries, whether Indian or non-Indian, of the most precious rights possible, the benefits of that State constitution and the U.S. Constitution and the Bill of Rights.

What is happening on reservations today has become a form of an autocratic collective, all of the power goes to the tribal council and the individual rights have been submerged. That is why, Senator and the panel, across this country 75 to 80 percent of Indian people no longer live on reservations. That's all in my opinion.

There is only a tiny fragment of people still living within reservation boundaries. Once they leave a reservation, they are entitled to all the benefits of their Constitution, in my case, Minnesota, Colorado, Oklahoma, and of course the U.S. Constitution. Once they go back inside, those rights disappear.

Things that Indian tribes need to protect their right to develop as any other city, town or unit of local government are in place already under the State and Federal Constitution, if you choose to use them. There is a limited form of immunity for cities, towns, counties, and school districts. They are administered by the State legislature in proper legislative forums. As you said, Senator, you believe in States' rights and I think all of us do.

If you organized the reservations like all other cities and towns in the State where the 80 percent of the Indian people reside, they would have this limited immunity, they would have a complete absence of taxation on municipal buildings. There is no income or property taxes on the government buildings in Seattle, Spokane, Reno, Las Vegas, and Denver.

So the present form of government has been sufficient for all of us in this country, including all Indian people living off a reservation. What has happened somehow is that when you move back onto it, you take away from these people their protections—that's why we're here—you have to understand the following.

On any piece of reservation or trust land, there is no guarantee the State constitution, the U.S. Constitution and its precious Bill of Rights control. There are no guarantees that civil rights acts, Federal or State legislation against age discrimination, gender discrimination, or sexual discrimination will be honored. There are no guarantees of the Veterans' Preference Act, no civil service classification to protect employees, no guarantees of OSHA, no guarantees of the Americans with Disabilities Act, no guarantees of the right to unionize, nor the right to teacher tenure laws, no right to the benefit of Federal and State whistleblower statues, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, no freedom of the press and no freedom of speech.

They may claim they are there, but the court cases you've been referring to are replete with distinct cites set out in my opinion that for some, to me, inexplicable reason, the U.S. Constitution does not imply in its entirety within reservation or trust land boundaries.

In my opinions as a judge, neither the Congress, nor the Oval Office, nor the judiciary, has the power to revoke the constitutional amendment giving all U.S. citizens, which American Indians are, all the rights and privileges of each individual State they reside in. You cannot do it without going through the cumbersome process of modifying the U.S. Constitution.

Yet, somehow de facto, that has been done. You do not have all the individual rights of your State constitution whether Indian or non-Indian, if you live on or pass through a reservation or trust land.

It is ironic that every time an American Indian sets one foot off a reservation, he's now guaranteed the benefits of that State constitution of which he's a citizen, the U.S. Constitution and the Bill of Rights. It is only within these enclaves that we have this amorphous, generic form of government.

There has been some reference to tribal courts. I do not know where to begin and I can see my lights are running out but every State has a constitution setting up a form of courts, generally appellate and trial. The U.S. Constitution, you are familiar with. Those judges are independent, either elected by the people or appointed by the Governor or the President with consent of the Senate. There are constitutions to follow.

There is no such thing with tribal courts. There are 556 federally-recognized reservations in this country. I'm totally familiar with those in Minnesota and several others. Take a look at the actual structure of any tribal court and see if you think that's a possible place for these people to see redress.

They may or may not have lawyers or judges, they may or may not have passed the bar, they may or may not have criminal records, they are not elected by the people and not appointed by the Governor or President with the advice and consent of the Senate. They have no independence.

If you need to protect the culture and spirituality, this is in my opinion, that can be done as we do it for the 99 percent of Americans who do not reside on reservations. We treasure the First Amendment in this country. The one place where you cannot enforce it is on a reservation. There is no freedom of speech and freedom of the press on a reservation or trust land.

We have in this country besides the major religions, Christian and non-Christian, sects, Amish, Mennonite and they are all State citizens of their States, enjoy all the protections of that State. The one place you can't guarantee those protections is inside a reservation boundary. The tribal courts have no enforcement mechanism, they have no body of law based on their State's constitution; that would be fine if they were a foreign country but they are not.

The very fact that we are here, the very fact Congress has the power to eliminate tribal immunity, leave it alone or increase it, as all court cases prove, shows they are under the plenary power of Congress, as all of us are. There is no case ever that equates any Indian tribe, nor any of our 50 States in the same category as Canada, Mexico, or New England.

I'm going to finish soon but the dynamics of this are, to protect the rights of Indian people within reservation boundaries, the sys-

tem in place since 1787 and the admission of the last State, Hawaii, will do fine.

The CHAIRMAN. Your Honor, I hate to interrupt you but as I mentioned earlier, there is a series of three hearings. This one was not primarily focused on civil rights, it's primarily focused on taxation, contracts, and taxes.

Judge RANDALL. May I respond?

The CHAIRMAN. I appreciate your testimony and I find it very interesting, enlightening, and educational, but we want to try to keep the focus. Otherwise, all witnesses will be getting off on all kinds of things that we simply won't have time to deal with in today's forum.

Judge RANDALL. May I respond and then I'll close.

The topic today is contracts and taxation. Our government is a contract between the governing body and its people. The 13 original colonies contracted only certain rights to the Federal Government for a union; the next 37 States did also. All rights of people between their governing bodies are a contract.

The best way to enforce these contracts in lobbying, commercial dealings, taxes and who gets taxed, is to observe the dictates of that State constitution as all Indian people are entitled to, and the dictates of the U.S. Constitution and the Bill of Rights. That is our contract with each other.

I appreciate the time to come here.

[Prepared statement of Judge Randall appears in appendix.]

The CHAIRMAN. Thank you.

We'll now go to Michael Harris.

STATEMENT OF MICHAEL HARRIS, ESQUIRE, TAHLEQUAH, OK

Mr. HARRIS. I appreciate the opportunity to address the committee. It seems fitting since John Marshall's Cherokee cases are largely responsible for this discussion that somebody from the Nation be present to continue to add to the confusion.

Senator Gorton took me back to law school as well and I started thinking about what a contract is. The first thing I learned in law school was it is a legally, enforceable agreement. Immunity forecloses enforcement of any agreement.

Sovereign immunity is not an inherent attribute of sovereignty. It was a doctrine which was an extension of a device legitimizing the rule of the monarchy, the divine hierarchy of the kings. We retained it in our common law but for different reasons.

It was thought at the time that any award against the government by the judiciary was a violation of the separation of powers, a disbursement of public moneys in favor of one citizen. However, the Federal Government and every State in this Union has abrogated to some extent their immunity because they realized that an injustice visited on one citizen is an injustice visited on all citizens when it's practiced by your government.

This principle has gained favor in every government except tribal government. It's hard to explain to people what life is and how to do business in Indian country with people who think it's adequately defined by section 1151, title 18. To know what Indian country means is to know what sovereign immunity means and the hysteria that surrounds any discussion of immunity always speaks

louder than an advocate opposing it. This alarm is not only misplaced, it's subversive.

Once you understand that sovereignty and sovereign immunity are different attributes with different aspects, then you can comprehend the injury tribal members are subjected to on a routine basis. It's like watching the drowning man ask for a glass of water. Immunity is as necessary to sovereignty as duct tape is to a good architect.

Sovereign immunity was conferred by judicial decision. This was based on unsupported presumptions and specious reasoning and the most well worn contention is it promotes economic development and self-sufficiency. This opinion kind of reflects an attitude that economic development is some sort of seismic event that issues forth from the ground to be enjoyed by the patient and watchful.

If modern economists agree on nothing else, they agree it's promoted by the proper business climate. If sovereign immunity were meaningful in any significant sense, why historically do Native Americans continue to rank at the bottom of all social and economic indicators, why is tribal unemployment averaging 50 percent and why with the enormous advantage and competitive edge of exemption from State taxes, Federal taxes and immunity from suit have no Indians completely dominated the market in every way?

The truth is tribal immunity deters growth, prosperity and economic independence. Non-tribal sources of investment and capital are understandably reluctant to negotiate agreements with tribes who are immune from suit. Legal uncertainties, high transaction costs and the very real threat that any agreement you enter will be found unenforceable are an impediment to commercial interaction between Indian tribes and non-Indians.

These obstacles are not as easily dispatched as some would suggest by including some contractual boilerplate of waiver of sovereign immunity, selection of law, selection of forum, because no agreement can bind if a person who contracts doesn't have the authority. This is not altogether clear.

Often there is considerable disagreement within a tribe who has the authority to contract. It's not uncommon at all for a judicial proceeding to determine well into the performance of a contract entered into by a chief or a tribal chairperson that it violated the separation of powers by dispersing moneys—that's a legislative function deferred to the council.

A contractor can't be certain that any subsequent enactment of law by the council will invalidate the agreement. Unless there is a law to the contrary, there is nothing that prevents any law from having retroactive effect as well as prospective effect.

These problems vary from tribe to tribe in frequency and magnitude because tribes are as different as the cultures they represent. No complement of competent lawyers can guarantee safe passage negotiating tribal law.

A local law firm in Washington, DC, Swidler and Berlin, 175 lawyers, is stuck in Federal litigation right now and in tribal court with the Cherokee Nation. Another law firm in Tulsa is in State court.

The CHAIRMAN. Mr. Harris, we're going to have to go on. We're going to have to stick closer to our time schedule.

[Prepared statement of Mr. Harris appears in appendix.]

The CHAIRMAN. I will now go to Scott Morrison from Wilburton, OK.

I would remind the panel that we're going to be dealing with civil rights, social problems, law enforcement and tribal jurisdiction and so on. We're going to try to keep the focus of this to taxation and contracts.

STATEMENT OF SCOTT MORRISON, ESQUIRE, WILBURTON, OK

Ms. MORRISON. Yes, sir; I can appreciate that but life often isn't clean and doesn't fit into one particular pigeon hole.

One of my most troubling concerns is where tribal sovereign immunity is being extended to. It's being extended to even against the Federal Government. The Eighth Circuit is considering whether or not it extends in the criminal area with Darrell Wadena's argument; the Seventh Circuit has decided that sovereign immunity applies in a false claims act on the civil side.

It's very troubling when even the Federal Government cannot sue a tribe. The tail is wagging the dog when that happens and we've got serious problems.

The situation I'd like to talk about, and I have personal experience, is a Federal contract with a tribe where my own tribe contracted Federal criminal jurisdiction and exercised it through a tribal court. However, when we tried to seek redress under the Federal Torts Claims Act, tribal sovereign immunity is being asserted against us.

The woman behind me is Rosie Burlinson. The arrest came out of passing out literature, passing out a one-page pamphlet. Ms. Burlinson was arrested for videotaping the arrest of a 64-year-old grandmother, and Major Dry was arrested 30 minutes later.

When our tribe adopted our constitution in 1983, we never granted criminal jurisdiction to our tribe.

The CHAIRMAN. What tribe is it?

Ms. MORRISON. It's the Oklahoma Choctaw Tribe. We decided our government could not be trusted with criminal jurisdiction over us. As it turns out, we were right, yet in 1990 when the Bureau of Indian Affairs signed a contract to exercise Federal criminal jurisdiction to our tribe, under Public Law 96–638 contract, from 1991 through 1995, our tribe received over $1 million but they only arrested three people. Our tribal membership is over 100,000. From 1995 until present, our tribe has received a second $1 million and they have only prosecuted a total of 15 people in these 5 years. Of the 15, 6 were members of Choctaw for Democracy, a group that wants civil rights, our basic concern. We want relief from tyranny, we want to have access to a court.

My written testimony discusses this in greater detail. Choctaw for Democracy may be viewed as whiners but in my written testimony, I included a list of nine cases we have in tribal court, Federal court, State court.

The CHAIRMAN. Your complete written testimony will be put in the record.

Ms. MORRISON. This is the writ, an example of the documents that we file. We have fought this for over 2 years. This is one document, a writ of habeas corpus that documents the problems that

we've had in our tribal court. This was dismissed in a one-line order from Judge Seay and now it's on appeal to the 10th Circuit.

When our tribe receives millions of dollars from the Federal Government under Public Law 93–638 contracts and self-government compacts, who can sue if we can't sue because of sovereign immunity and the Federal Government can't sue because of sovereign immunity? What do we do? Where else can we go?

The voter registration list which is maintained through Federal funds, a Public Law 93–638 contract, is not available to all candidates and if all candidates don't have access to our voters which are scattered across the world, then we simply cannot vote the bums out.

Without review in Federal court, Choctaw citizens and other citizens are simply at the mercy of a government that's out of control and has proven itself capable and willing to harass and intimidate tribal members. I think the Choctaw Nation is just a microcosm of what's going on all across the country.

With the current trend of the law, sovereign immunity will extend even against the Federal Government, then I think everyone has serious problems and we need to take a serious, realistic look at it. The whole point of sovereign immunity was to protect unique customs and traditions. However, when it's gotten to a point where unique customs and traditions are no longer valued in Indian country, we have a problem.

Our tribe basically has taken the position we are a business, that we are a mere corporation. When we become just a business, then there is no unique customs and traditions to protect. Customs and traditions for Choctaws is loving one another, respecting one another and respecting diverse opinions. That's not happening.

So if the purpose of sovereign immunity is to protect unique customs and traditions, once they are gone, what's the point of sovereign immunity? We've simply become a business. I, as a Choctaw woman and the woman standing behind me, are not a business. We are human beings and we deserve respect and dignity and that's all we're asking for.

Thank you.

[Prepared statement of Scott Kayla Morrison appears in appendix.]

The CHAIRMAN. Chief Martin. I would remind the panel to try to keep their comments to taxation or contracts.

STATEMENT OF PHILLIP MARTIN, CHIEF, MISSISSIPPI BAND OF CHOCTAW INDIANS

Chief Martin. Thank you for this opportunity.

There's been a lot of lawyer talk here, so there's no need to get into that.

I've been working for the tribe 40 years and we have grown from about 5,000 to over 8,000 people. Back in 1945, there was very little opportunity for Choctaws. They were not allowed in the public schools and jobs were scarce, Choctaws weren't working permanently, so we decided that if we're going to live here, if we're going to maintain our culture, our way of life, then we were going to have to do something about it.

On that basis, what really got us going was the Office of Economic Opportunity grant that was made directly to the tribe for them to plan, design and implement. That was to me the beginning of tribal government in our case we didn't get recognized by the Federal Government until 1945. From 1830 to 1945, we were not citizens of anybody. If we were, we weren't enjoying the benefit of citizenship.

I hear a lot of talk today about how bad tribal governments are. Well, this act should not be at all because if you make a study you're going to find a lot of tribes are trying to develop economy on their reservation, they're going to have to allow limited sovereignty waivers, they're going to have to take the risk to become more dependent on themselves.

I believe this sovereignty business is not needed by tribes. The act is not in the best interest of government or this country. If it wasn't for the sovereignty, I would not have been able, the tribe would not have been able to make the progress we have.

Let me cite a few. In 1979, we first opened a small plant doing work for General Motors. They didn't come in with a lot of money, they gave us one-half of a million dollar contract and we borrowed the money and paid on the plant and equipment, and operating funds. That was a small contract until they saw we could produce. They saw we could do a quality product, deliver the product on time at a competitive rate. So word got around in the automotive industry that there was a minority enterprise and a tribe that can compete.

We did not have a contract. Whatever two parties make and agree upon is what I call a contract. You don't need a law to say you have to waive your sovereign immunity. The big companies find out within a year's time whether you're going to produce a quality product or meet their schedule. If you don't do that, they'll let you go. So far, our people have risen to the occasion and we have been very successful in my judgment.

We have 10 manufacturing plants as well as business operations. We employ nearly 6,000 people of all races. We borrowed a lot of money to do this.

I might add that the Indian Finance Act is one of the best acts for tribes to get into tribal government because it can guarantee your loan up to 90 percent. Before then, I was trying to get a loan from the local banks and they wouldn't even talk to me. Today, we have bankers and investors all standing around to see if they can get something going with us.

To me, you will do harm if you insist on this being approved by the Congress. We're going to be out there fighting you. We value our right to self-determination and nobody can expand on those concepts if they're restricted.

Thank you.

[Prepared statement of Chief Martin appears in appendix.]

The CHAIRMAN. Ron Allen, if you'd like to proceed?

STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. ALLEN. Thank you, Mr. Chairman, Vice Chairman Inouye and Senator Gorton. It's always an honor and pleasure to be able

to come before you on the various issues you address that affect Indian country.

I'm here representing the National Congress of American Indians. It's always an honor to follow such leaders as Chief Phillip Martin because he and other tribal leaders who have been fighting for our sovereignty and the rights of tribal governments to co-exist in the American political system put the fire and the passion in all of us who are championing this fight every day and every year as we experience these different proposals that we believe undermine the fundamental Federal tribal relationship that has existed and been recognized in this country for 200 years.

We're concerned about this legislation and we, quite frankly, object to it, because we believe it is reversing 25 years of policy that this Congress has administered and advanced to strengthen the tribal governments, to strengthen their self-determination and self-governance capacities, to assist tribal governments in pursuing self-sufficiency goals and to achieve our objectives economically.

We're very concerned about the campaign of what we believe is misinformation. When you bring cases before us and examples, we believe we can respond to them tenfold with more examples of successes.

If you want to talk about taxation issues, we can show you how it is working. If you want to show us an example where it isn't working, we can show you ten examples where it is working.

We do not live in a perfect political system. This Congress is dealing with problems every day. We have those problems in Indian country too. We believe they can be resolved. We believe there are constructive and progressive answers to the issues being raised.

The notion that the American Indian and Alaskan Native Tribes do not honor the Constitution and the fundamental rights of the Constitution is preposterous. We absolutely honor and respect it. Our whole governmental system is structured around it. One of the things we advocate is this Congress should be honoring its commitments and its obligations to our tribal governments.

You have proposed three hearings of which this is one to talk about the various issues that affect sovereign immunity and we appreciate you're methodically trying to address them so we can methodically respond to them with what we believe is true information regarding each of these issues.

On taxation issues, yes, there are certain issues out there that we hear about but we can show you hundreds and hundreds of agreements that have been identified earlier where we do have agreements, where we do have negotiations between the tribes and the States on these taxation issues.

We think the numbers being thrown out are wrong, we think they're preposterous. Also, we would emphasize that quite frankly, these State governments have an obligation to Indian tribes and they have not lived up to those obligations and the majority of those revenues do not go back to the Indian communities that are among the most impoverished in this Nation in each and every one of those States, which has irritated us and has been the subject of these negotiations for tax recoveries.

The issues for us in that area, we can resolve them. We can resolve it between States and the tribes. This Congress should not be

using heavy-handed legislation initiatives to advance that agenda, you should be providing incentives out there to assist the tribes and the State governments in terms of issues that they have a mutual concern regarding where these taxes should go and how they should be used to the benefit of all the people in the State, of which Indian people are also citizens and have needs for roads, health clinics, schools and housing assistance, et cetera. Our moneys are used for our government just like any other government.

With regard to contracts, we do emphasize and appreciate the comments made by the administration representatives. Contracts with businesses and tribal governments and our businesses are ones that should be voluntary. It should be recognized to be voluntary. If it's a big contract of any great magnitude, then they should be bringing along their attorneys and understand Indian law. They should understand exactly where redress and remedies are if they're going to be in violation. They should recognize there is a tribal court system that they will be utilizing to address those remedies. If they do not like that, they should be negotiating alternatives. We believe that is appropriate.

I want to emphasize I believe there are constructive solutions and we have emphasized that with this Congress. This Congress has recognized that the courts need to be strengthened. We agree with that. The Congress has not stepped up, in our opinion, to meaningful address the financial needs of our court systems to bring them to the level we want. The Tribal Justice Act of 1993–94 was one that emphasized that point.

There is no such thing as a neutral court. There are courts that adjudicate good law and understanding of the law. That's what we want. We do not want to lose that authority. We think it's an atrocity to try to divert tribal issues to State and Federal courts. It would flood them, it would cause problems and quite frankly, those judges don't have as good a fundamental knowledge of Indian law as the tribal court judges do.

We would emphasize as you move forward in this legislation, please don't advance legislation based on generalizations and anecdotal situations that you may think are atrocity and the norm in the country. They are not. Most of these issues are local issues and they should be resolved at the local level.

Last, we believe this Congress has a fundamental obligation to live up to its responsibility to tribal governments, to protect tribal government status because we can and will coexist with the American political system. We belong here.

Thank you.

[Prepared statement of Mr. Allen appears in appendix.]

[Applause.]

The CHAIRMAN. This isn't a football hearing where we choose up sides and cheer for our guys. This is a U.S. Senate hearing and we'd appreciate staying within the decorum of this hearing.

Mark, if you'd like to finish, please.

STATEMENT OF MARK JARBOE, ESQUIRE, DORSEY AND WHITNEY, LLP

Mr. JARBOE. Thank you for inviting me to appear. I hope my presence will be helpful to the committee.

I will focus my remarks on the subject of contracts but I'd first like to make an observation. Early this morning in connection with the testimony of Representatives Istook and LaHood, Mr. Chairman, you referred to the Supreme Court's recent *Seminole* decision. Under *Seminole,* a State, even though required by Federal law to negotiate a gaming contract with a tribe under the Indian Gaming Regulatory Act, can refuse to do so. If it doesn't, no action can be taken against it. The tribe has absolutely no recourse.

I submit, Mr. Chairman, that one should reasonably expect that if there are Federal requirements that States and tribes enter agreements on the collection of sales and excise taxes, and if the only consequences for failure to reach an agreement fell on the tribes, as they would under the proposals of Representatives Istook and LaHood, there would be no incentive for the States to enter those agreements and there would be no recourse for the tribes if the States refuse to do so, just like under *Seminole.*

Turning to the issue of contracts, I'm a partner in a law firm of 450 lawyers. We're a worldwide business law firm, representing 36 tribal governments, representing people doing business with tribes—banks, investment bankers, construction contractors, equipment providers.

From this vantage point, and from our experience in Indian country, I can testify from personal experience, that tribal sovereign immunity is not an obstacle to contracting with Indian tribes. It is an issue, yes, an issue that has to be addressed in the give and take of contractual negotiations, like any other issue, but it is not an obstacle.

The reason that it can be dealt with and the reason that it is being dealt with successfully is first, contracts, as President Allen said, are voluntarily agreements, entered into by two willing parties and unless both sides are satisfied that the total sum of advantages in the contract outweighs the disadvantages, they're not going to enter into them. Both sides have to be satisfied on all points, including the issue of tribal sovereign immunity.

Second, tribes, in order to enter the stream of commerce as they have been doing more and more in the last 10 years, have come up with creative ways that deal with the sovereign immunity issue, that deal with it in ways that serve their purposes, that meets the needs of the people with whom they are contracting, and that satisfies their own basic tribal values.

May I remind the committee that the evolution of sovereign immunity in the Federal Government and the 50 States took place over decades and it all worked out differently. There is no model waiver of sovereign immunity act promulgated by the National Commission on Model State Laws. There is no comparable uniform waiver of sovereign immunity act. Each State does it differently, each tribe does it differently.

Permit me to give you some examples, recent examples of transactions in which I participated. The Las Vegas Paiute Tribe in Nevada is developing a golf resort on 4,000 acres of tribal land just outside of Las Vegas. Before it started to finance that project, it did three things, two of which are instrumental here.

First, it established as a division of tribal court, a tribal commercial court. The tribal commercial court has jurisdiction over all con-

tract and civil matters where the amount in controversy exceeds $50,000. The judges of that court have to be licensed attorneys. They don't have to be tribal members, but they have to be licensed attorneys.

That court applies the substantive contract law of the State of Nevada, adopted as tribal law, but this is a division of tribal court, not a State court.

The other thing the tribe did was hold a secretarial election to amend its tribal constitution. It went that far to include in the constitution a contract prohibiting the tribe from taking any action to impair the obligation of contracts. Such a provision appears in the Federal Constitution and applies against the States. It doesn't apply to the Federal Government, it doesn't apply to tribal government, but the Las Vegas Paiute Tribe applied that to itself.

That has been sufficient for the tribe to borrow four times from Bank of America a total amount in excess of $25 million to finance its golf resort development and all of those loans transactions are enforceable in the Las Vegas Paiute Tribal Commercial Court.

Other tribes have set up similar courts. The Mohegan Tribe has set up a Tribal Gaming Disputes Court, 60 attorneys are licensed to practice there. It's similar to the Paiute.

The Cow Creek Band of Umpqua Tribe of Indians in Oregon has adopted a tribal arbitration code under which contracts in which the tribe agrees to arbitrate disputes are specifically enforceable in tribal court, the obligation to arbitrate is enforceable in tribal court, and the arbitration award is specifically enforceable in tribal court. That earlier this month was sufficient for the tribe to enter into a contract with a service provider to its tribal health facility.

In Washington State, the Colville Confederated Tribes have established Colville Tribal Enterprise Corporation, a tribal instrumentality to carry out the tribal businesses. CTEC recently borrowed $10 million from Key Bank of Washington where the enforcement mechanism is a waiver of sovereign immunity from CTEC, not from the tribes but from CTEC, and only in Colville Tribal Court. That was satisfactory to Key Bank of Washington.

The Confederated Tribes of the Grand Ronde Reservation similarly set up a tribal corporation for its Spirit Mountain Development Corporation which has borrowed from John Hancock Mutual Life Insurance Company $25 million in order to finance that tribe's development operation.

Waivers of immunity by the tribal corporation but not by the tribe are negotiated out. These are different techniques that those tribes have found appropriate for their circumstances and large and small contracts are enforceable through those techniques through voluntary negotiation.

[Prepared statement of Mr. Jarboe appears in appendix.]

The CHAIRMAN. Thank you, Mr. Jarboe.

First of all, I was very interested in the comments you made about the tribal commercial court and the other courts you mentioned used by the Colville and other tribes. Are those being used as models for any other tribes that you know of?

Mr. JARBOE. Not that I know of. A copy of the Las Vegas Paiute Tribal Court Code is submitted along with my written testimony. The Cow Creek Band of Umpqua Tribe of Indians has set up some-

thing similar. As I mentioned, Mohegan and other tribes are doing the same but there is no kind of model that's out there.

The CHAIRMAN. You have submitted that in your testimony?

Mr. JARBOE. Yes; I have.

The CHAIRMAN. Chief Martin, as I understand your tribe, the Choctaws in Mississippi are in about the top four or five employers in the whole State of Mississippi, correct?

Chief Martin. Yes; that's what they tell me. We're the largest employer in our county.

The CHAIRMAN. You mentioned some are Indian and some are non-Indian. You have a contract with GM to make seat harnesses?

Chief Martin. We started with General Motors but they decided to go to Mexico, but we're doing business with Fortune 500 companies, Ford Motor Company, Chrysler, American Greetings Corporation.

The CHAIRMAN. Do you also sell commodities or gasoline and cigarettes as an example?

Chief Martin. I don't smoke. We have one smoke shop on the reservation.

The CHAIRMAN. Do you have a form of agreement with the State of Mississippi?

Chief Martin. The agreement was that they would have to pay tax and they are.

The CHAIRMAN. So they do?

Chief Martin. Yes; we sell gasoline on the reservation but whatever tax has to be paid, we pay that.

On retail, we sat down with the State and at the time we were negotiating there was very little money on the reservation from sales, so they give us the authority to go ahead and collect the tax and keep it.

What they wanted to do was develop fair taxation so the people wouldn't be hollering unfair tax, so we got that worked out and we collected our own tax and we don't have to send it to the State.

The CHAIRMAN. Under S. 1691 which would waive immunity regarding contracts, do you believe that would hinder your tribe's ability to create jobs and wealth within your tribe?

Chief Martin. I believe so because we've been operating as a business should operate, deal with whoever you want. There's no give and take. What we're working toward is win-win. If our partner is going to benefit and we're going to benefit, then we've got a good contract.

In the case of dispute, we have provisions in there for outside hearings, we can set up independent groups or we can go to one of the Federal agencies.

The CHAIRMAN. You have a method of arbitration?

Chief Martin. Also, the sovereign immunity part, we waiver up to the amount of money they're going to invest in the project. If it's $2 million, then we waive that much. I believe both sides have to have a good deal. If something happens that we're in breach, then they can take action against us. If they're in breach, we're going to do the same thing.

The CHAIRMAN. Under that waiver, if a company you entered an agreement with makes a substantial investment on the reservation,

under that waiver if something goes wrong, they could sue to recover their investment?

Chief Martin. Yes; on the reservation, the tribe has to own the building, equipment, those types of things. The tribe has to purchase that and the operator comes in.

The CHAIRMAN. Ron, you mentioned a number of contracts. I thought you said something like hundreds. Do you have any definitive number of the number of contracts that are in place now with States dealing with taxation?

Mr. ALLEN. No; we don't know the exact number. We will compile that because we know that is a fact that needs to be clarified. We know there are tribes all over the Nation that have these tax agreements with the States over cigarettes, liquor or gasoline sales. That's a matter of record out there.

The CHAIRMAN. Senator Inouye, did you have some questions?

Senator INOUYE. No.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Mr. Jarboe, if the bill that is subject of this hearing were the law, would it have prohibited any of the agreements for tribal jurisdiction over contract disputes that you described to us?

Mr. JARBOE. I believe so because under S. 1691, parties contracting with Indian tribes could simply sue the tribes in State court or if there were to be Federal jurisdiction, the Federal court, and there would be absolutely no reason at all for the contracting parties to agree to negotiate the issue of immunity and court jurisdiction.

If there's a balance here in terms of the various things under negotiation, this would be weighing down one side of the balance with one stomp.

Senator GORTON. In any contract between two contracting parties whether it involves Indian tribes or not, the court jurisdiction is there but the contracting parties can agree to binding arbitration and waive their rights to go into courts. My question was whether or not anything in this bill would prohibit the tribe from insisting, in connection with such a contract, on the jurisdiction of its own courts. Nothing in the bill would, would it?

The bargaining position might be somewhat removed, but if the tribe felt that was important, it could insist on that as a condition of any such contract, could it not?

Mr. JARBOE. Freedom of contract would permit the tribe to do that. You're right, Senator, the bargaining position would be drastically changed.

Senator GORTON. Mr. Allen, in the tax case I asked the Administration witnesses about, the Supreme Court 18 years ago said the State, the State of Washington, "may validly require the tribal smoke shops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to non-members of the tribe." I assume you don't agree with that decision, but it is the law of the land.

It is your position that tribes, through the exercise of sovereign immunity, should be able to defy that decision and refuse to affix those tax stamps prior to the time of sale to non-members of the tribes?

Mr. ALLEN. Actually, that's not correct, Senator. We, as a matter of practice with the State, have an agreement with them regarding our allocation of cigarettes that are allocated to the tribes and their cigarette shops. That allocation is based on our tribal membership. It was a technique the State used to avoid having to figure out how much sales was sold to non-Indians and how much was sold to Indians. They collect our tax and the cigarettes we sell are stamped.

Senator GORTON. You're speaking now with respect to your own tribe but you feel that tribes, in general, if they wish to do so, may ignore that specific statement by the Supreme Court, refuse to purchase tax stamps in advance and before they have sold cigarettes by the exercise of their sovereign immunity?

Mr. ALLEN. With regard to coming from non-Indian sources, yes. We believe that we have authority between the tribes as a matter of commerce, as authorized in the Commerce Clause, that we can have intertribal commerce. So if we are to buy cigarettes from each other, from tribes, that is not within the State jurisdiction. The law does not address that particular matter.

When it comes from sales of distributors within the State's jurisdiction, then as far as I'm concerned, the law says what it says and we have to comply with it. We in Washington State do comply with it.

Senator GORTON. The State Department of Revenue informs me as of this week, the cost to the State of the sale of non- tax cigarettes to non-Indians is $64 million a year.

Mr. ALLEN. We heard that too and we dispute that calculation.

Senator GORTON. So you say no cigarettes are being sold to non-Indians on Indian reservations without State tax stamps on them?

Mr. ALLEN. That, I don't know. I know sales is being sold to non-Indians, but I know the system we use now, it is calculated in the allocation system that we have.

Senator GORTON. I guess I can't get a straight answer out of you.

Mr. Harris, once again, would you simply refresh me and the panel on what you learned the definition of a contract was?

Mr. HARRIS. An agreement which is legally enforceable.

The CHAIRMAN. Let me ask just one last question. It's my understanding that cigarettes sold on reservations are not legal for resale. Is that correct? If you buy them on the reservation and don't pay taxes on them, is there a different stamp on them? What is to prevent somebody from buying a semi-load of cigarettes on the reservation, if you didn't have to pay taxes, and taking them downtown and putting them back on the market and reselling them? Is there something in place now that deals with that?

Senator GORTON. The answer is, the State, under those circumstances, would put the guy in jail because he wouldn't be a member of the tribe and he'd be off the reservation.

Mr. ALLEN. That's correct.

The CHAIRMAN. Thank you and I thank this panel for appearing. If you have further comments, we will put them in the record.

Chief Martin. A couple of requests. First, I understand you're going to be having hearings throughout the country?

The CHAIRMAN. Not throughout the country. We're going to do two more but we are limited by budget constraints. We can't re-

quest to do them in a number of States. We simply can't do it. There will be one in Seattle and one in Minneapolis.

Chief Martin. It seems like every Indian problem comes along, everybody goes west but we have 23 recognized tribes. I think we deserve more attention than that. If you can consider and do it, having a hearing at Philadelphia, Mississippi, we can show people what progress we have made in our community.

We're not here just to hope we're going to do something; we're here because we've done things that have improved the lives of not only Indian people, but our neighbors in the community as well as the State.

We don't pay direct tax to the State but indirectly, we pay a lot of tax to them.

The CHAIRMAN. We'll have staff look at our budget and see where we are. We can't give any assurance we'll do that, but we may.

Did you have a final comment, Judge?

Judge RANDALL. I'll leave you with one thing, Senator. Perhaps you've heard it. It's an old Navajo wind chant——

Remember all that you have been told here today for everything forgotten will not disappear but it will return to the circling winds.

I appreciate what the panel has to do and what it has to deal with. Vaya con Dios.

The CHAIRMAN. We'll now go to the last panel. That will be Jeffrey Klein, New York State Assemblyman; John Lattauzio, Chief Executive Officer, J&J Mini-Markets, Alamogordo, NM; Tom Love, Love's Country Stores, Oklahoma City, OK; Gregory E. Pyle, Chief of the Choctaw Nation, Oklahoma; David Kwail, President, Inter-Tribal Council of Arizona and Reid Chambers of Sonosky, Chambers, Sachse and Endreson.

We will start in that same order with Mr. Klein going first.

STATEMENT OF JEFFREY KLEIN, ASSEMBLYMAN, NEW YORK STATE ASSEMBLY, ALBANY, NY

Mr. KLEIN. Good morning, Mr. Chairman, members of the committee.

My name is Assemblyman Jeff Klein. I represent the 80th Assembly District in the New York State Assembly. I represent parts of Bronx County in New York City.

I'm appearing today as a representative of concerned New York State officials who believe the issue of Native American State excise tax evasion has reached crisis proportions in our State.

I would like to begin by stating that I am not advocating that States tax Native Americans. I'm here to request that State governments be given absolute authorization from Congress to allow for the collection of State excise taxes imposed on non-Native Americans when these non-Native Americans purchase commodities such as cigarettes and motor fuel from Native American tribes or tribal corporations.

Two years ago, I uncovered a proliferation of illegal or bootleg cigarettes being sold throughout New York State. My investigation revealed that smuggling groups are illegally importing cigarettes from low tax States such as North Carolina and Virginia and selling the contraband to hundreds of illicit retailers across our State

at a far lower price than legal wholesalers and retailers can provide.

The New York State Department of Taxation and Finance estimated that the State loses approximately $70 million and the city of New York $12 million in cigarette tax revenue due to this illegal trade. The State and various localities are hard hit by the scam because approximately $7.80 per legal carton of cigarettes sold, about one-third the price of a carton, goes to the State and local governments via excise and sales tax.

Under my Cigarette Tax Enforcement Act of 1996, storeowners can face a complete revocation of their license to sell cigarettes for a 5-year period if caught more than three times selling bootleg cigarettes. The law also requires that the Department of Taxation and Finance notify the Director of the Lottery Commission of any violations of the cigarette tax law and states that a retailer's license to sell alcohol may also be revoke for violating the statute.

In the 2 years since the law took effect, the State has collected an additional $30 million in excise tax. However, the growing problems of Native American tax evasion undermines all headway this law made in the fight to stop these bootleggers by making it tempting to buy untaxed cigarettes sold within our own State borders.

The State will continue to be hard hit by opportunists who import cigarettes from reservations and resell them to illicit retailers throughout the State. There is no need for these opportunists to make the long trip to North Carolina or Virginia, they only have to make a short trip to their local reservation.

In fact, in some cases, the drive may not even be necessary. Many Native American reservations throughout New York State advertise they will ship tax free cigarettes via United Parcel Service anywhere in the State and proudly advertise they do not report to any tax authorities. Yes, they even collect credit cards.

In 1994, a U.S. Supreme Court ruling allowed States to impose sales tax on Native American sales to non-Native American customers. This decision allows the State of New York to enforce collection of taxes against wholesalers or distributors of gasoline, diesel fuel and cigarettes.

It should be noted that the State of New York spent 6 years and an untold amount of money and time on this lawsuit. The New York State Department of Taxation and Finance still estimates we are losing $300 million in annual tax revenue in uncollected excise tax on the sale of cigarettes and motor fuel. Approximately one-third of this loss is attributed to cigarettes and one-third to motor fuel.

In fact, the problem of untaxed out-of-state cigarettes I identified 2 years is mild when compared to the unabated and accelerated growth of new Native American convenience stores, duty-free warehouses and gasoline outlets opening up all over our State, doing a flourishing business selling tax-free products to Native and non-Native Americans alike.

In addition, as State petroleum taxes have increased to finance roads, bridges, and transit, the disparity of prices charged by off-reservation retailers and on-reservation Native American retailers aggressively advertise and market their self-imposed illegal exemp-

tions from State taxation to non-Native American purchasers by selling motor fuel at low discount prices.

I believe today that Senator Gorton's proposal is an extremely positive development in terms of New York's plight, offering a tangible, realistic means to address this issue. In particular, section 3 offers a ray of hope for retailers struggling to stay in business.

This section would provide a State with an absolute right to sue a tribe in Federal court to collect lawfully imposed State excise taxes on sales to non-Native Americans. Under this section, a tribe would also waive its tribal sovereign immunity only to the extent necessary for a State to enforce the obligation imposed by this section. Thus, a tribe could not hide behind the veil of sovereign immunity to escape the obligation which the U.S. Supreme Court has sanctioned.

On behalf of New York State and the thousands of small businessmen and women who are struggling to survive against the unfair competition of untaxed sales to non-Native Americans by Native American tribes, I applaud this hearing to allow an open discussion of this very important issue. I thank Senator Gorton and his colleagues for introducing this legislation.

I appreciate your courtesy in hearing my testimony. I'd be happy to answer any questions.

[Prepared statement of Mr. Klein appears in appendix.]

The CHAIRMAN. Before we go on, did you have something in your testimony, perhaps copies of the so-called ads the tribes are taking out?

Mr. KLEIN. Yes; I do, Senator. I have a whole folder.

The CHAIRMAN. Would you turn in some of those, please?

Mr. KLEIN. I certainly will.

The CHAIRMAN. We will now go to Mr. John Lattauzio.

STATEMENT OF JOHN LATTAUZIO, CHIEF EXECUTIVE OFFICER, J&J MINI-MARKETS, ALAMOGORDO, NM

Mr. LATTAUZIO. My name is John Lattauzio. I am President of J&J Mini-Markets of Alamogordo, NM.

J&J operates six convenience stores in New Mexico with motor fuel operations and we're located in the southern part of the State.

I'm appearing today in my capacity as a member of the Board of The National Association of Convenience Stores, as a member of the Petroleum Marketers Association of American. I am also privileged to serve on the board of the New Mexico Petroleum Marketers Association.

As an initial matter, I would like to thank you for calling this hearing today. For years, NACS and PMAA and other petroleum marketing organizations have called for congressional attention to the issue of State tax evasion by Native American tribes and Native American corporations. We welcome this hearing on this important issue and thank the committee for allowing us the opportunity to express our concerns.

I want to be clear regarding the issue under discussion. NACS and PMAA do not advocate and have not advocated permitting States to tax Native American tribes, tribal corporations or tribal members. Instead, NACS and PMAA advocate the States receive an express authorization from Congress to enforce U.S. Supreme

Court decisions that Native American tribes and tribal corporations must collect and remit excise taxes imposed on non-Native Americans when these non-Native Americans purchase commodities such as motor fuels and tobacco products from Native American tribes or tribal corporations.

This issue is fairly easy to understand. When an non-Native American customer buys 10 gallons of gasoline from one of my stores in New Mexico, I am required to add 17 cents per gallon to the cost to the customer and State gasoline excise taxes.

If, on the other hand, a tribal member buys the same 10 gallons of gasoline from a tribe-owned convenience store, the Supreme Court has stated that the State gasoline excise tax may not be imposed. These two fact patterns are not in dispute.

Under a third scenario, however, the Supreme Court has stated that if a non-Native American buys 10 gallons of gasoline from a tribe-owned convenience store, then the State gasoline excise tax is to be imposed on the non-Native American and the tribe has an obligation to assist the State by collecting and remitting this tax to the State. It is this third scenario that is at issue here today.

We're not talking about taxing Native Americans; we are talking about taxing non-Native Americans and the responsibility the Supreme Court has stated tribes have to assist the States in collecting these excise taxes from non-Native Americans.

The Court, in a series of decisions, stretching back three decades has examined the issue of Native American state excise tax evasion closely and issued an invitation for Congress to address this problem.

First, the Court has settled the question as to whether Native American tribes must collect and remit State excise taxes on motor fuels and tobacco products imposed on non-Native Americans when it is a Native American tribe or tribal corporation that sells these products to non-Native Americans. The Court has held that tribes have the obligation to assist the States by collecting and remitting these taxes on non-Native Americans.

Second, due to the doctrine of tribal sovereign immunity, the Court has stated that the States generally cannot enforce this obligation on Native American tribes. In other words, the States have the right to require the assistance of the tribe, but do not have the method for enforcing that right.

Third, the Court has stated only the Congress has the authority under the Constitution to correct this legal inconsistency. Thus, if Native American excise State tax evasion is to be curbed, it is up to the Congress to act. This is the reason for my appearance before you today.

NACS and PMAA respectfully urge this committee to consider and adopt legislation to give States the right to enforce the tribes' obligation to collect and remit lawfully imposed State excise taxes on sales to non-Native Americans by Native American retailers. According to the Supreme Court, only Congress has the authority to grant this relief.

My home State of New Mexico is currently grappling with this legal disconnect. Truck stops, convenience stores and smoke shops operated by Native American tribes will be evading approximately $14 million in State excise taxes on motor fuels and tobacco by the

end of this year. These tribes are not paying to the State either the 17 cents per gallon State excise tax on gasoline or the 32 cents per pack excise tax on cigarettes when they sell these products to non-Native Americans.

As a direct result, New Mexico's tax base is diminished at a time of record demands on State government. In addition, motor fuels and tobacco retailers such as myself and other New Mexico marketers find it impossible to compete against a group with such a cost advantage, a cost advantage achieved only through tax evasion.

New Mexico is not alone in facing this problem. To varying degrees, the following States are grappling with motor fuels or tobacco excise tax evasion by Native American tribes: New York, Michigan, Oklahoma, North Dakota, Arizona, California, and Washington. Together it has been estimated that States are losing $500 million in tax revenues annually from Native American excise tax evasion.

NACS and PMAA support the approach taken by Senator Gorton in section 3 of S. 1691 to address this issue. Simply stated, this section of Senator Gorton's legislation would give a State the express right to sue a tribe in Federal court to collect lawfully imposed State excise taxes on sales to non-Native Americans.

My company and other private parties would not be permitted a cause of action under section 3. Only a State could bring such suit against a Native American tribe. Thus any argument that this section would subject tribes to scores of frivolous lawsuits simply is not supported.

This section also would require a tribe to waive its tribal sovereign immunity only to the extent necessary for a State to enforce the obligations imposed by this section. Section 3 would not require a blanket waiver of sovereign immunity. Instead, it would simply stop a tribe from hiding behind a legal loophole to escape the obligation the Supreme Court has sanctioned.

It is important to me and NACS and PMAA that our support for section 3 is not mischaracterized. We are not seeking to vilify Native Americans or even those Native American retailers that are evading these taxes. Given the opportunity, I am sure that I and other members of NACS and PMAA would take advantage of a loophole that would allow us to avoid paying State or Federal taxes. That would not make us bad people, that would make us business people.

NACS and PMAA support the economic development success of Native American tribes and corporations and would welcome the opportunity to assist these tribes and corporations in achieving their success.

I want to thank you for this opportunity to appear before you this morning. I'll be happy to answer any questions.

[Prepared statement of Mr. Lattauzio appears in appendix.]

The CHAIRMAN. Mr. Love.

STATEMENT OF GREG E. LOVE, CHAIRMAN OF THE BOARD, LOVE'S COUNTRY STORES, INC., OKLAHOMA CITY, OK

Mr. LOVE. Good morning, Mr. Chairman.

My name is Greg Love. I'm president of Love's Country Stores, a chain of 127 convenience stores and motor fuel outlets operating

in eight western States, including Oklahoma, New Mexico, and Arizona. Love's is headquartered in Oklahoma City, OK.

I'm appearing here today on behalf of the Society of Independent Gasoline Marketers of America and NATSO which represents the truck stop industry.

Petroleum marketers in Oklahoma and other States have been facing the issue of Native American State excise tax evasion for over 15 years. A public examination of this issue is long overdue.

I'm here today for one very simple reason, to tell this committee about motor fuel excise tax evasion by Native American tribes in Oklahoma. You may hear other testimony today that asserts this tax evasion problem no longer exists in Oklahoma, nothing could be further from the truth.

We must all be clear in our understanding of the type of tax evasion at issue. This issue is not about Native Americans evading State excise taxes imposed on the tribes. The U.S. Supreme Court has stated conclusively that States do not have the authority to impose State excise taxes on the tribes. SIGMA and NATSO do not dispute the court's position on this very narrow issue.

The tax evasion that is at issue here is evasion of a tribe's obligation to collect State excise taxes when a non-Native American purchases gasoline or diesel fuel from a tribal truck stop or convenience store.

The Supreme Court has stated repeatedly that tribes have an obligation to act as an agent of the State in collecting these State excise taxes from non-Native Americans, just as my company has an obligation to assist the State in collecting the taxes for purchases at our stores.

For many years, in Oklahoma, Native American tribes refused to fulfill this obligation and this refusal placed my company and others at a severe competitive disadvantage. Simply stated, the Native American State excise tax evasion places us in a position in which it was impossible for our company to make a profit on our operations that competed directly with Native American stations.

Let me give you an example of this competitive disadvantage. We prepared an actual profit and loss statement for one of our stores that has been in direct competition with a tribal travel plaza. In 1995, our company experienced a loss from that particular store of just over $5,000 on sales of $6.5 million. If a Native American tribe owned that store and evaded payment of State taxes, that store would have made a profit of over $925,000 on the same sales level and same expenses, other than the tax. This example illustrates just how profitable this tax evasion can be.

In response to exactly this type of situation, we petitioned our State government in Oklahoma for a solution. To its credit, our government responded. Not once but twice Oklahoma was forced to take Oklahoma tribes all the way to the United States Supreme Court in its attempts to enforce the State motor fuel excise tax laws.

Finally, in 1996, Oklahoma was able to reach an agreement with several of the most active tribes in the motor fuels retailing business in Oklahoma. In return for the fulfillment of the tribe's obligation to collect and remit motor fuel excise taxes to the State, participating tribes are to receive a payment from the State equal in

fiscal year 1999 to 4.5 percent of all State collections of motor fuel excise taxes. That's the compact the State signed with some of the tribes.

On paper, this agreement should have solved our State's problem. Unfortunately, it didn't. First, only 9 of Oklahoma's 39 registered Native American tribes have signed the agreement. That means that over 75 percent of Oklahoma's tribes are not bound by this agreement and are not required to collect and remit State excise taxes on the motor fuel purchased by non-Native Americans at the retail outlets.

Second, the agreement is entirely voluntary on the tribes' part. Those tribes that have signed the agreement may withdraw from the agreement at any time and return to the price of excise tax evasion.

Third, the agreement does not prevent Native American tribes from evading State excise taxes either manufacturing gasoline or diesel fuel themselves, or by importing these motor fuels from outside the State, which is very important. The State enforcement on its taxes of interstate sales is problematic without the support of the Federal Government and without some direction from Congress.

Attached to my testimony are letters and articles from representatives of Oklahoma tribes that indicate they are trying to import motor fuels from Texas and New Mexico to evade the excise tax collection system set up by the State of Oklahoma.

Fourth, this compact agreement covers only excise taxes on motor fuels. It does not cover sales or excise taxes on tobacco products. The State of Oklahoma does have a compact with the tribes on tobacco but it's a separate deal.

In short, any testimony you may hear today that the problem Oklahoma has experienced with Native American excise tax evasion has been solved is inaccurate. Instead, the Oklahoma solution is no more than a stop gap, band-aid solution which has not been effective in stopping all tax evasion and likely will unravel further in the near future.

Why did the State of Oklahoma enter into this seemingly one sided agreement with the tribes? The answer to that question is simple, lack of bargaining power. Under Supreme Court decisions, the State has the right to these State excise taxes but does not have the ability to enforce that right when Native Americans do not fulfill their obligation to collect and remit the taxes.

Without the ability to petition our judicial system for a remedy, the State of Oklahoma has a right without remedy.

This committee in particular and Congress in general has the ability to alter this balance of bargaining power. SIGMA and NATSO urge this committee to pass legislation that gives States the express authority to sue Native American tribes in Federal court for evading State excise taxes on motor fuel and tobacco when these products are purchased by non-Native Americans at Native American stores.

The Supreme Court has stated it is up to Congress to authorize such lawsuits. SIGMA and NATSO urge Congress to pass such legislation.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Love appears in appendix.]
The CHAIRMAN. Thank you.
Chief Pyle.

STATEMENT OF GREGORY E. PYLE, CHIEF, CHOCTAW NATION OF OKLAHOMA

Chief Pyle. I'm Gregory Pyle, Chief of the proud Choctaw Nation of Oklahoma. We're the third largest Indian tribe in the country. On behalf of 107,000 members, I want to express my sincere appreciation to come before this committee.

Tribal sovereignty is the lifeblood of the American Indian's ability to maintain our culture, our heritage and our right of self determination. For many years, our people were on the bottom rung of the social and economic ladder in the country. After the passage of the Indian Self-Determination Act, the U.S. policy changed to one of tribal self determination and economic development.

American Indian tribes were encouraged to become self-sufficient, free of Federal financial dependency. For every dollar Indian tribes make and put back into assistance for our citizens, this is a dollar less we are dependent on the Federal and State governments. If tribes were not considered sovereign entities and not recipients of Federal funding, the burden of responsibility for the care of these citizens would fall back on the State and Federal Governments.

Sovereign immunity can be a positive force for all people, Indian and non-Indian alike, when used appropriately. Our profits are not used to make individuals wealthy or to compensate shareholders. We use our profits for such basic things as educating our children, improving our peoples' health care, providing safe and decent housing and other causes, things which most Americans today take for granted. These are the goals and purposes of Choctaw tribal enterprises.

There are 4,100 retail fuel outlets in Oklahoma today, 18 of these are tribally owned. Choctaw Nation owns 8 of these fuel stops. We have entered into a compact with the State and they collect 100 percent of all taxes not only in Choctaw country, but for the entire State simply because they collect it at the refinery.

Because of our gaming revenues, economic development ventures and money earned from our fuel tax compact with the State of Oklahoma, the Choctaw Nation of Oklahoma has begun tribally funded programs to provide eyeglasses, dentures, hearing aides and other medical equipment for our tribal members.

Recently, we added $100,000 to our energy assistance program so our people would not be cold this winter. We recently put in $200,000 for scholarships so that our kids can go to college for the first time in their entire family. We also allocated $400,000 for destitute Indians that have no other place to live. We put $100,000 into Boys and Girls Clubs in several counties. We have the highest unemployment rate in the State and the Nation in our country.

These programs are wonderful examples of how tribal sovereignty benefits both American Indians and non-Indian communities by sharing State, Federal, private and tribal resources. We are in the process of constructing an American Indian Center at Eastern Oklahoma State College in Latimer County, OK. This will

reduce the tremendous dropout rate of 85 percent among Indian populations, unheard of in the non-Indian culture today.

The tribal council has contributed $1.2 million in tribal funds, most of which is 100 percent out of the State compact funds. The Choctaw Nation has created 1,500 new jobs, out of 107,000 people. We're building a new hospital, and not waiting for the Federal Government to build it for us. The old hospital was started in construction in 1929 and we do need a new hospital. We're utilizing existing health dollars, fuel tax dollars, gaming dollars, tribal economic development dollars. This is going to provide immediate services to our Indian people and will reduce the burden of the U.S. Government.

The Federal Government projected $39 million for construction of this facility and we are building it for $22 million, thereby saving the tax dollars to the U.S. Government of $39 million.

I would like to point out last year alone, gaming revenues allowed 500 additional higher education scholarships to be awarded to Choctaw youth. This year, we anticipate over 1,000 Indian children will be able to go to a university of their choice because we have gaming and fuel tax revenue.

I urge this committee and the Senate on behalf of the citizens of the Choctaw Nation to defeat legislation that would strip us of our sovereignty and our ability to care for our children, our elders and our disadvantaged citizens.

Yakoke. Thank you and may God bless you.

[Prepared statement of Chief Pyle appears in appendix.]

The CHAIRMAN. We will now go to David Kwail.

STATEMENT OF DAVID KWAIL, PRESIDENT, INTER-TRIBAL COUNCIL OF ARIZONA, INC.

Mr. KWAIL. Mr. Chairman, members of the committee, tribal leaders and staff, thank you for inviting your Inter-Tribal Council of Arizona to testify in this important issue.

My name is David Kwail. I am President of the Inter-Tribal Council of Arizona. This statement is made on behalf of the 19 member tribes of the Inter-Tribal Council of Arizona.

More than one-half of all reservation lands, 25 million acres, and one-half of the American Indian reservation population in the United States are in Arizona. Generally, there are few non-Indian residents on reservations in Arizona.

This hearing is about whether the United States will honor its sacred word to the Indian Nations to respect and protect the sovereignty of our permanent tribal homelands. The United States has given its word on countless occasions in order to secure treaties and agreements with us. Somehow, because of the passage of time or politics, economic convenience or outright racism, we are repeatedly required to remind the United States of its sacred word. To the American Indian tribes and nations our word and that of the United States never gets too old to keep.

The origin of the law of sovereignty is the same for all nations. Under international law and the law of nations, it is the vital principle upon which the U.S. Constitution and the treaties with the American Indian nations was built, the right to govern our affairs within the boundaries of our perspective nations. The United

States and our nations each have the power to govern our citizens through the adoption of our governing documents.

The right of Indian tribes to govern the activities within our territories has been recognized for over 500 years. Spain made treaties with the Indian nations of the west under the law of nations. Britain, France, Holland, Russia, the United States, and Mexico followed in this tradition.

In the southwest, treaties made between Mexico and the United States required the United States to recognize and honor earlier commitments made to tribes by Spain and Mexico. The treaties of Guadalupe Hidalgo, the Gadsden Treaty and the treaties with the Apache Nation and the Navajo Nation govern the relationship of the United States and tribes in Arizona.

Treaties are the supreme law of the land under the Constitution. Congress, as a condition, described the precise condition under which the States including Arizona and New Mexico would be permitted to enter the Union. To remove any implication of a State claim under the constitutional property clause, Congress, in the enabling act, required the States of Arizona and New Mexico to specifically disclaim all rights. Certain Federal lands and lands owned are held by an Indian or an Indian tribe.

In addition, Congress required a number of other provisions for the benefit of Indians to specifically preclude New Mexico and Arizona from taxing Indians on Indian lands within Indian country. Finally, the benefit of the Indians to specifically confirm the policies that have existed from the time of the Articles of Confederation to this date, Congress specifically required Arizona and New Mexico to refrain from exercising any jurisdiction or control over Indian tribes or their property.

It also required the States to acknowledge that the absolute jurisdiction which all parties understood to be exclusive rested with Congress.

Over the centuries, fueled by greed and racism, our tribes have suffered repeated attacks. Many would subject us to suits in State and Federal courts. For sure the purpose is to exhaust and destroy us. The U.S. Supreme Court has said the power to regulate is a power to destroy. The concept of a State vesting any tribunal with the power to enforce or extinguish rights and duties is built upon the fundamental concept of power.

Anyone who is not a member of an Arizona tribe who wishes to enter the reservation for business or personal reasons can avail himself to the rights and remedies under the tribal law.

In addition, the United States Code [U.S.C.] and the Code of Federal Regulations set forth additional requirements for contracts, leases and permits and trading within the Indian Federal reservation. If additional regulation and legislation was thought to be needed, the U.S. Department of the Interior and the Department of Justice would present proposed legislation to Congress under the Federal-State enabling acts, the constitutions of many western States, including Arizona. States are precluded from taxing Indians, Indian tribes and Indian property. Tribes have reserved the right to levy and collect taxes.

Let me get to S. 1691.

The CHAIRMAN. We will ask you to make that very brief.

Mr. KWAIL. The tribes of Arizona unanimously oppose the legislation in any form that would violate the sacred word of the United States made to us over the last two centuries.

Thank you.

[Prepared statement of Mr. Kwail appears in appendix.]

The CHAIRMAN. Mr. Chambers, if you'd like to finish this panel?

STATEMENT OF REID CHAMBERS, ESQUIRE, SONOSKY, CHAMBERS, SACHSE AND ENDRESON

Mr. CHAMBERS. Thank you. I thank the committee for the honor of inviting me to make this presentation.

I'll limit my oral testimony to one question and that is why the Congress should not waive the sovereign immunity of Indian tribes to permit States to sue them to collect State taxes on non-Indians doing business with Indians on reservations.

There are four reasons why Congress shouldn't do this.

The first reason is that, as the Supreme Court ruled in the Potawatomi case seven years ago, there are adequate remedies available. The Court mentioned a number of them—precollection of the taxes from the first entry into the State, suits against individual Indian retailers, indeed even the possibility of suits against tribal officials for acting contrary to the law, and perhaps most importantly, the possibility of making intergovernmental agreements with the tribes.

In my testimony, I set forth 19 States, the majority by far with Indian reservations, that have entered into such agreements with most tribes in those States. My information is that 18 tribes in the State of Washington have entered into tax agreements with that State. Our information is that 17 tribes in Oklahoma have done so with cigarette taxes and there was testimony about 9 doing it on motor fuels taxes. New Mexico has agreed to exempt, as a matter of State statute, transactions on Indian reservations from the State tax. So I don't think it's accurate to talk about that as tax evasion—or, where there is an agreement, to talk about that as tax evasion. I think there are adequate remedies for States.

Now let me address Senator Gorton's question to Associate Solicitor Jordan—what about the tribes that don't have an agreement? There's several reasons there why the waiver should not be enacted in these situations.

One is that it's not clear, as some witnesses have suggested, that in a transaction between an Indian and a non-Indian, the transaction is inevitably taxable with respect to the non-Indian. The Supreme Court has not adopted a clear test in that regard. In Senator Gorton's *Colville* case, my recollection, and I don't have the case before me, is that Justice White talked about the preemption test turning on an accommodation between the tribal interest, the State interest and the Federal interest.

Later that year in the *Bracker* case, I think just 2 weeks later, the Supreme Court articulated the test that has applied ever since—which requires a particularized inquiry into the various interests that are involved, a balancing test. The Court held in Bracker that a highway use tax could not be imposed on a non-Indian contractor doing business with a tribe on the reservation. The same day or the day after in the *Central Machinery* case, it held

that a gross receipts tax could not be collected on a contractor selling tractors to a tribe on a reservation in Arizona.

In the *Warren Trading Post* case, it held that a gross receipts tax could not be collected on a non-Indian trader doing business with Indians. In the *Ramah* case, the Supreme Court held similarly—no State tax on a contractor constructing a school.

Even in the cigarette area, the courts have looked to complicated questions like where the legal incidence of the tax is. So in Oklahoma, the Supreme Court held in the *Chickasaw* case that the taxes could not be imposed because the legal incidence was not on the ultimate purchaser of the cigarettes. So it's not fair to talk about that as evading taxes.

What actually happens here, when these cases go to court—and I sit as a private lawyer and I've represented tribes for 22 years, trying to advise them about the law—is that the law is uncertain about when States can tax non-Indians on reservations. Therefore, the outcome of litigation is uncertain and the litigation is costly and burdensome. If it's going to be, as S. 1691 proposes, litigation in Federal court, it's going to be burdensome on the Federal courts or on any court that has to consider it.

The other point I want to make is that tribal immunity should not be waived because waiving it does not treat tribes like other governments. This bill is not going to treat tribes equally with State or the United States. No one would think of waiving the Federal Government's sovereign immunity and having them sued in State court and having State law apply to the Federal Government. It would be unthinkable, in fact unconstitutional, to waive the immunity of States to be sued anywhere other than State courts or for the Congress to waive the immunity of States and set the terms of that. If S. 1691 passes, the tribes would be the only sovereign in this country that would be subjected to suit in other courts or have the standards of the other sovereign set what the terms of the waiver would be.

Last, if you're going to consider the matter, and I urge that you not, but if you do, I urge you to consider the economic impact of decisions like the *Colville* decision. One reason they've been bitterly resisted is that they disfavor commerce with Indian tribes.

The economic impact of *Colville* is that for a tribe has no ability to give incentives to people to do business with the tribe. Indeed, the tribe has to give up its own taxing power to have an equal playing field with the non-Indians.

So what Colville does is disfavor commerce with the poorest people in the country. That is why, I think, New Mexico statutorily exempts these transactions from taxation and if Congress is going to consider the matter, you should consider doing that.

Thank you very much, Mr. Chairman.

[Prepared statement of Mr. Chambers appears in appendix.]

The CHAIRMAN. Thank you. It's nice we've got so many experts on the Supreme Court decision around here. Being a jeweler in my private life didn't prepare me for all these in-depth discussions.

I had a couple of questions but first I would tell this panel and the preceding panel that Senator Inouye did have to leave but he has a number of questions he would like to submit for the record

to you and if you could get those back in writing. That same request would apply to the former panels.

You brought up a number of interesting things to me, Mr. Chambers. I'd like to ask this question to Tom Lattauzio.

As I understand the court decision, and perhaps Senator Gorton can help me because he certainly knows more about this than I do, there are several suggested options—they could stop shipments, they could stop them from traveling on the highways, they could tax them at the wholesale level, bring suits against tribal officials and so on. There's things in place as options now.

He mentioned that characterizing it as illegal tax evasion, particularly in Mexico, as I understand it, even though the Supreme Court said they would tax, there is an exemption in the State of New Mexico. The State legislature made that exemption. How could they be characterized as illegal tax evasion if the State gave them that exemption?

Mr. LATTAUZIO. Senator, I'm not prepared to answer that question but I'd be happy to get you an answer and submit that to you in writing.

The CHAIRMAN. That will be fine. I might say perhaps you need to speak in another forum too and that is in your State legislature if you think they're actually doing something legal in their State.

That's really the only question I had. Senator Gorton, you may have several?

Senator GORTON. Mr. Chambers is a considerably greater expert on these tax laws than I am in spite of my now relatively ancient experience but I think the answer to the points he made is really quite simple. It is certainly true that there are some kinds of transactions on Indian reservations involving non-Indians that the Supreme Court has determined are not taxable by the States and there are certainly other kinds of transactions in which that is an open question.

The passage of section 3 of this bill would not change that at all. It doesn't make taxable transactions that are not taxable now, it simply allows a State to collect a tax when the court says the transaction is taxable now.

The statement I think in Mr. Love's statement is the appropriate one. You have a situation in which the Supreme Court has said there is an obligation on the part of Indian enterprises to assist the State in the collection of taxes that the State has validly imposed, but there is no remedy for that right. In spite of the fact the Supreme Court has said there is that right, the State can't enforce that right.

That is as paradox and it is an utter injustice that exists almost nowhere else in our legal system. I do not attempt in this bill to say that the tax laws are different, that transactions not now taxable should be taxable. I simply say the State ought to be able to collect the taxes the Supreme Court says are validly its own.

I would like the three first witnesses here to comment on the real world. We hear from the Department of Justice and these other people that there is no problem. I assume you shouldn't be here because there really isn't a problem, there is no discrimination against non-Indian business people whose businesses are located near reservations.

My figure is $64 million in the State of Washington——

Mr. KLEIN. $300 million, Senator.

Senator GORTON. They're just not real, it's not there. There is no problem. I just wonder if any of you feel a little bit put upon by having your tax dollars spent by the government of your United States and the Department of the Interior and the Department of Justice telling you your States ought not to be able to collect taxes that are validly due those States and if non-Indian businessmen are driven out of business by unfair competition, that's just tough.

Mr. KLEIN. I certainly hear enough about it, Senator and that's what urged me to write my original legislation which had to do with the untaxed cigarettes coming in from other States such as Virginia and North Carolina.

Lo and behold, 2 years later, that's really mild compared to what is happening now with the Native American non-taxed cigarettes coming in all over the city of New York as more and more of these convenience stores, mail order houses, gasoline stations start coming about. So it's a very serious problem.

We have regulations on our books in the State of New York to collect the tax. We even have the Supreme Court decision which was argued personally by our attorney general, the *Itia* case which said we can enforce our regulations and collect the taxes, but unfortunately we're not doing that. That's why I think we're losing this excise tax, cigarettes and motor fuel combined to the tune of $300 million.

Senator GORTON. New York does not discriminate against members of Indian tribes who are residents and citizens of the State of New York in providing the services that these taxes finance?

Mr. KLEIN. Absolutely not.

Senator GORTON. So they're entitled to all tax paid services?

Mr. KLEIN. Absolutely, roads, bridges.

Senator GORTON. But they don't want to collect the taxes even from non-Indians?

Mr. KLEIN. That seems to be it. Again, as I said before, we're not talking about taxing Native Americans. We're talking about taxing non-Native Americans who purchase taxable goods.

Senator GORTON. Mr. Love, you stated and I tended to get this from Chief Pyle as well, the agreement with some of the tribes with respect to motor vehicle fuel taxes is collected at the level of the refinery?

Mr. LOVE. Yes, Senator.

Senator GORTON. So now you find tribes buying their motor vehicle fuel from outside the State?

Mr. LOVE. Whether that's happening or not, I don't know but it's very possible that it could be happening.

Senator GORTON. That would be outside the scope of these agreements?

Mr. LOVE. Sure. If they were to bring product in from a State where the tax was not precollected as we're calling it here today, that could happen.

Senator GORTON. Mr. Chairman, with respect to this panel dealing with taxes only and with section 3 only, the only potential plaintiffs are States, the 50 States in the United States and all the statute does is create a remedy where there is already a right.

We have several statements. You and I discussed the fact that more people wanted to be with us.

The CHAIRMAN. Without objection, all the statements will be inserted.

Senator GORTON. So anyone on either side who has a written statement can have it included.

The CHAIRMAN. Absolutely.

Mr. Love, how far is your nearest store from what you might call a tribal competitor store?

Mr. LOVE. We have one store across the street.

The CHAIRMAN. You may not be able to answer this but you might try to find this information for the panel, do you know if the State of Oklahoma has ever calculated the economic advantages of having tribal lands within the State including such things as tourism, Federal grants, tribal enterprises, sale of tribal arts in non-Indian galleries and stores and all those kinds of things where it has been an economic advantage to the State to have Indian tribal lands?

Mr. LOVE. Yes; I'm sure that has been done. The State of Oklahoma is 80 percent to 90 percent Indian land.

The CHAIRMAN. I noticed with interest that license plates of Oklahoma, the signs when you enter Oklahoma, many of the brochures in different cities, towns, communities, always use Indian images or Indian appearances or Indian tribal cultural things as sort of a lure to bring people into the State of Oklahoma.

Mr. LOVE. That's very true.

The CHAIRMAN. I've been many times to what is called Red Earth in Oklahoma City, a huge celebration and I don't know what the economic impact is in Oklahoma City for that but I'd imagine it would be considerable as all those seem to be now. I'd be interested in knowing that and if you have any access to that information, I'd like to have it. If you don't, we might be able to get that from the State itself.

With that, I have no further questions but there are a number that will be submitted by our different members who could not be here today.

[Questions and the answers appear in appendix.]

The CHAIRMAN. I would remind everyone in the audience, this is the first of three hearings, if you have additional information you'd like to submit for all three of those. This records of this particular one will stay open for 2 more weeks if you have additional comments.

With that, thank you for your appearance and this committee is adjourned.

[Whereupon, at 12:48 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The committee meets this morning to address matters that apparently have given rise to the introduction of a measure by our colleague and friend, the senior Senator from Washington State.

If we are to properly address these matters, we must have a clear understanding of the historical and legal context in which they operate.

Indian Tribes and Nations are governments. Should there be any doubt about the accuracy of this statement, we need only to look to the writings of our founding fathers and the subsequent debates of the continental Congress. For it is there that we find some of the earliest recorded observations of the governmental structure of the Confederacy of the Iroquois Nations.

In fact, it is abundantly clear that the Iroquois Confederacy's form of government was the model of government that our founding fathers ultimately adopted in forming and organizing the government that was to become the United States of America.

Should one desire further evidence that Indian nations are sovereign governments, we can look as well to the fact that the United States entered into treaties with the Indian nations.

Our Constitution makes clear that treaties are the documents which express the legal relationships between sovereigns, and that as such, they are the highest law of the land.

Beginning in 1832 and for 166 years thereafter, the United States Supreme Court recognized and has consistently reaffirmed the inherent sovereignty of the Indian nations.

Over the course of our history as a Nation, the United States Congress, with the approval of every President of the United States, has enacted into Federal law literally hundreds of legislative initiatives that are premised upon the fundamental principle that the Indian nations are sovereign governments.

So this is where we begin—this is the foundation of law and policy upon which our relationships with the Indian nations have been built, and shaped and defined for well over 200 years.

My colleague's bill, as I understand it, would divest the Indian nations of their governmental status and relegate them to the status of individuals or private corporations for purposes of legal actions in State and Federal Courts.

Given this dramatic, and some would say radical departure from the well-established course of our history and our laws, I believe it is only natural to inquire what it may be, in law or in fact, that would demand or require us to so abruptly abandon what has stood for so long.

In the area of taxation, the U.S. Supreme Court has established the law, in the case of *Montana* v. *the United States*. There, the Court stated, "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may

regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribes or its members, through commercial dealing, contracts, leases, or other arrangements."

We have ample evidence that State and tribal governments are not only capable of, but regularly do enter into compacts and agreements addressing matters of taxation.

Just a few months ago, several such agreements—entered into by the State of Washington and some of the tribal governments in Washington State—were made available to this committee. Of course, they are not alone. Taxation agreements have been entered into by States and tribes all over the country.

Because both State and tribal governments are recognized as having the authority to tax, these agreements typically address matters such as the exercise of those authorities by each government, the apportionment of taxation, and the manner in which taxes are to be collected. These agreements customarily also provide one or more mechanisms for the resolution of disputes, should they arise. These may include mediation, arbitration, or an agreement that the parties will seek a determination by a court of competent jurisdiction.

If a judicial determination is the mechanism elected by the governments for the resolution of any disputes that may arise, it is also common that mutual waivers of their respective rights to assert sovereign immunity are contained in the agreement or compact.

These compacts and agreements are consistent with the manner in which the governments of our union have always defined and shaped their relationships with one another.

I am not aware of any compelling body of evidence that would warrant the taking of a unilateral action by a third government—one which is not a party to the matters at issue.

I know of no precedent for the fashioning of a cause of action that authorizes one government to bring a claim against another government but bars the other government from having its claims heard. The Supreme Court has expressly rejected this notion in a case known as *Blatchford* v. *The Native Village of Noatak*, on the grounds that there must be a mutuality of consent by both governments to sue and be sued.

Having reviewed the written testimony submitted to the committee for today's hearing, let us also be clear that what some would seek from this body, is not an alternative means of collecting State taxes, but rather action by the Federal Government to assure that commercial activities conducted on Indian lands are rendered incapable of competing in a free market place.

Today, we are increasingly aware that we live in a global economy. Our markets are sensitive to events far beyond our shores. In Hawaii, we say that when the economies of the Pacific Rim Countries sneeze, our economy gets a cold.

The strength of our national economy is however equally dependent upon and sensitive to our domestic markets. And though few too many have elected to ignore this reality for far too long, the strength of Indian reservation economies is no less crucial to our economic well-being as a Nation.

Several years ago, a Harvard professor, Joseph Kalt, reported to this committee that after years of studying the economies of Indian country, there was one singular factor that could predict a strong tribal economy better than any other. That was the extent to which a tribal government exercised its sovereignty and had the necessary infrastructure to carryout its full array of governmental responsibilities.

Ours is a Nation that jealously guards the free market nature of our national economy. Sometimes we make mistakes. Usually, it is when we allow government to favor one economic interest over another.

I fully intend to stand with my colleagues in the Senate to assure that this Government lives up to its promises of fair and honorable dealings with the Indian nations. Together, we will do all that we can to assure that tribal governments and their citizens are not foreclosed from pursuing the economic opportunities that our laws and our constitution guarantee to all Americans.

And I would call upon those who do business in Indian country-the bankers, the corporations, the major industries-to join us in protecting these investments and these relationships that have been forged not out of political influence but rather as a function of honest, fair, arm's-length dealings amongst equals on the now infamous "level playing field".

In the field of contracts, it is well known that the Federal Government, the State governments and their political subdivisions, as well as tribal governments, enter into contracts—thousands upon thousands of contracts—on a daily basis.

Typically, the parties to these contracts will not only seek to define the nature of their relationship under the contract, they will also identify what route they will pursue should a dispute arise from their dealings.

It is a well-known fact of every day life in America, that if the parties elect to resolve their disputes in a judicial forum, there must be an express consent by any government that is party to a contract to be sue and be sued.

Usually, if a government consents to suit, it will be for purposes of actions brought in the courts of that sovereign. In most cases, for instance, the parties to a contract cannot, by virtue of their agreement alone, confer jurisdiction upon the courts of another sovereign.

These are well understood principles of contract law-perhaps the oldest body of law on our planet.

As Americans, it is such a fundamental tenet of our constitution and our laws-that Government shall not interfere with the right of parties to freely enter into contracts with one another-that unless we intend to contract to engage in some criminal or otherwise illegal activity, we have come to rely on our constitutional protections against government intrusion in private relationships.

Our forefathers fought hard for this principle-many lives have been sacrificed to protect this freedom.

The better course of action, in my view, it to make certain that our citizens know that governments must consent to suit—and thereby assure that such consent is secured, if it be the course of action preferred by the parties to a contract.

It seems clear to me that if tribal governments refuse to waive their sovereign immunity to suit in a contract setting, there will be those who will elect not to do business with the tribal government. the loss of a contract opportunity will fall on the tribal government.

Let us not take any step which would impose between the freely-contracting parties—the mighty hand of the Federal Government.

Our Supreme Court Rulings have made it abundantly clear-when constitutional rights are implicated, any remedy must be narrowly tailored to address the harm identified.

Let us ever be mindful of what is at stake—our history, our laws, our constitutionally-protected rights as citizens of this great Nation.

Let us proceed carefully and rationally. If there are solutions needed to problems that are articulated here today, let us be certain that we have considered all possible alternatives before we cast aside that which we consider most precious in this Nation—our freedom and our laws.

PREPARED STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM OKLAHOMA

I would like to thank the chair for holding this hearing, and I look forward to reviewing the thoughts and opinions expressed by the participants.

After reviewing the American Indian Equal Justice Act, I am particularly interested in reviewing testimony on section 3, the collection of State taxes. Although Oklahoma and several tribes have taken positive steps to rectify the contentious State gas tax issue, I remain concerned with possibilities that many of Oklahoma's small business owners may face an unfair competitive advantage. Our responsibility to examine the bounds of tribal immunity must carefully determine a fair method of recourse for non-tribal entities while avoiding unnecessary tribal government subjection to State and Federal jurisdictions. I am hopeful that through these discussions a complete understanding and mutual consensus can be reached.

I would like to thank each of the participants who have come from all corners of the country to share their valuable insight and perspectives on tribal sovereignty. And, I also thank fellow Oklahomans and personal friends, The Honorable Ernest Istook, Chief Greg Pyle of the Choctaw Nation, Greg Love from Love's Country Stores, Michael Harris of Michael D. Harris Law Office, and Ms. Scott Morrison, Attorney at Law—for the sacrifices they have made to be here today.

PREPARED STATEMENT OF HON. PAUL WELLSTONE, U.S. SENATOR FROM MINNESOTA

Mr. Chairman, I am pleased that we have this opportunity to discuss Indian sovereign immunity, and how it relates to contracts and State excise taxes. This committee is the proper forum to address such concerns, which are often raised by Senator Gorton, and I appreciate this chance to share my views on this important matter.

I strongly oppose efforts to impose limits on tribal sovereign immunity from suit. All governmental entities are endowed with immunity to protect their official ac-

tions from undue judicial interference. To waive tribal sovereign immunity would open up tribes to a barrage of lawsuits, which would severely limit their abilities to conduct governmental operations.

In addition, limiting tribal sovereign immunity would undercut tribal self-determination efforts. The great importance of Indian self-determination policies as they relate to economic development on reservations can easily be seen in my State of Minnesota. Significant jobs have been created in Indian communities where unemployment has been 50 percent or higher. Indian welfare recipients have become Indian taxpayers. Revenues have been generated for Indian tribes, permitting them to begin to make inroads into the huge unmet needs created by inadequate Federal funding.

Rather than waiving sovereign immunity from suit, a better approach is promote continued dialog between States and tribes. In my State of Minnesota, the government to government relationship between the tribes and the State continues to be open and respectful. I certainly hope the positive relationship between the tribes and the State of Minnesota is maintained. Unfortunately, I am concerned that relationship, as well as the relationships of other State governments with the Indian tribes within their borders, would suffer if Congress were to approve a measure which significantly undermined tribal sovereignty.

I have heard from every tribe in Minnesota repeatedly regarding their concerns about proposals to limit tribal sovereign immunity, even on a limited basis. They have all voiced their strongest and most vehement opposition to such proposals. If tribes are forced to limit their sovereignty in certain areas—then look out, it's a slippery slope—more attempts to undermine tribal sovereignty would be sure to follow.

I can not stress enough that American Indian sovereignty and economic development go hand in hand. A wise American Indian female leader and Founding President of the First Nations Development Institute, Rebecca Adamson, once said, "We cannot educate our children; we cannot preserve their health; we cannot protect their well-being; if our livelihood is dependent others. Tribes will emerge from dependency only by developing the capacity to control their economic future." When she said this she laid out the key to economic development: that is the preservation of American Indian sovereignty. I agree with her 100 percent.

PREPARED STATEMENT OF ASSEMBLYMAN JEFFREY KLEIN, NEW YORK STATE ASSEMBLY

Good Morning, Mr. Chairman. My name is Assemblyman Jeff Klein. I represent the 80th Assembly District in the New York State Assembly. My district includes parts of Bronx County in New York City.

I am appearing here today as a representative of concerned New York State officials who believe that the issue of Native American State excise tax evasion has reached crisis proportions in our State. I would like to begin my comments by stating that I am not advocating that States tax Native Americans. I am here to request that State governments be given absolute authorization from Congress to allow for the collection of State excise taxes imposed on non-Native Americans when these non-Native Americans purchase commodities such as cigarettes and motor fuel from Native American tribes or tribal corporations.

Two years ago, I uncovered the proliferation of illegal or bootleg cigarettes being sold throughout New York State. My investigation revealed that smuggling groups are illegally importing cigarettes from low tax States, such as North Carolina and Virginia, and selling the contraband to hundreds of illicit retailers across our State at a far lower price than legal wholesalers and retailers can provide. The New York State Department of Taxation and Finance estimated that the State loses approximately $70 million and the city $12 million in cigarette tax revenue due to this illegal trade. The State and various localities are hard hit by this scam because approximately $7.80 per legal carton of cigarettes sold, about one-third of the price of a carton goes to State and local governments via excise and sales tax.

Under my cigarette Tax Enforcement Act of 1996, store owners could face a complete revocation of their license to sell cigarettes for a 5-year period if caught more than three times selling bootleg cigarettes. The law also requires that the Department of Taxation and Finance notify the Director of the Lottery Commission of any violations of the cigarette tax law, and states that a retailer's license to sell alcohol may be revoked as well for violating the provisions of the law. In fact, in the 2 years since the law took effect, the State has collected an additional $30 million in excise tax. However, the growing problem of Native American tax evasion undermines all headway this law made in the fight to stop these "buttleggers" by making it tempting to buy untaxed cigarettes sold within our own State borders.

The State will continue to be hit hard by opportunists who import cigarettes from reservations and resell them to illicit retailers throughout the State. There is no need for these opportunists to make the long trip to North Carolina or Virginia, they will only have to make a short trip to their local reservations. In fact, in some cases the drive may not even be necessary. Many Native American reservations throughout New York State advertise that they will ship tax free cigarettes via United Parcel Service anywhere in the State, and they proudly advertise that they do not report to any tax authorities. And yes, they even accept credit cards.

A 1994 United States Supreme Court ruling allows States to impose sales tax on Native American sales to non-Native American customers, this decision allows the State of New York to enforce the collection of taxes against wholesalers or distributors of gasoline, diesel fuel, and cigarettes.

It should be noted that the State of New York spent 6 years and an untold amount of time and money on this lawsuit and as the New York State Department of Taxation and Finance estimates we are still losing $300 million in annual tax revenue in uncollected excise tax on the sale of cigarettes and motor fuel. Approximately one-third of this loss is attributed to cigarettes and two -thirds to motor fuel.

In fact, the problem of untaxed out-of-state cigarettes I identified 2 years ago is mild when compared to the unabated, and accelerated growth of new Native American convenience stories, duty free warehouses, and gasoline outlets opening up all over our State doing a flourishing business selling tax-free products to Native and non-Native Americans alike.

In addition, as State petroleum taxes have increased to finance roads, bridges, and transit the disparity of prices charged by off-reservation retailers and on-reservation Native American retailers aggressively advertise and market their self-imposed illegal exemptions from State taxation to non-Native Americans purchasers by selling motor fuel at low "discount" prices.

Senator Gorton's proposal is an extremely positive development in terms of New York's plight, offering a tangible, realistic means to address this issue. In particular, section 3 offers a ray of hope for retailers struggling to stay in business. This section would provide a State with an absolute right to sue a tribe in Federal court to collect lawfully imposed State excise taxes on sales to non-Native Americans.

Under this section, a tribe would also waive its tribal sovereign immunity only to the extent necessary for a State to enforce the obligations imposed by this section. Thus, a tribe could not hide behind the veil of sovereign immunity to escape the obligation which the United States Supreme Court has sanctioned.

On behalf of New York State and the thousands of small businessmen and women who are struggling to survive against the unfair competition of untaxed sales to non-Native Americans by Native American tribes, I applaud this hearing to allow an open discussion of this very important issue and I thank Senator Gorton and his colleagues for introducing this legislation.

Mr. Chairman, I appreciate your consideration of my testimony. I would be happy to answer any questions you or the committee may have.

Testimony of Congressman Ernest J. Istook, Jr
Senate Committee on Indian Affairs
March 11, 1998

Good morning. Chairman Campbell, Senator Inouye, Members of the Committee. It is my great pleasure to appear before the Senate Committee on Indian Affairs this morning to discuss one of the jurisdictional problems which exist between local, State, and Tribal governments.

For two years Congressman Peter Visclosky and I have worked to ensure that the tax schemes of State and local governments are protected from unscrupulous businesses which refuse to collect the proper sales and excise taxes, as well as to try and encourage fair competition between Indian and non-Indian businesses. Our efforts have not been to try and limit the abilities of Tribal governments which have tax agreements with their neighbors, but with the Tribes and individual Indians which operate businesses without regard for the communities in which they live.

We have based our efforts on the rulings of the Supreme Court, which has evaluated the treaties signed by the Federal government and Indian tribes. As you know, the Supreme Court has ruled that Indian tribal members are exempt from State and local sales and excise taxes , but that non-Indians purchasing items on Indian trust lands are not exempt from those taxes. Even though the Supreme Court has ruled that **states have the right to assess taxes on sales to non-Indians**[1], the right has been meaningless when tribal businesses could

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[1] These excerpts are from decisions of the United States Supreme Court:

"It can no longer be argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the tribes"
"The State may some times impose a nondiscriminatory tax on non-Indians customers doing business on the reservation."

(*State of Washington v. Colville*, June 10, 1980)

"Enrolled tribal members purchasing cigarettes on Indian reservations are exempt from New York cigarette tax, **but non-Indians making such purchases are not.**"
"On reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state

not be required to collect the taxes on non-tribal sales, as other businesses must. **As the Supreme Court decisions make clear, only sales to members of the tribe are properly exempted from such local and state taxes.** Unfortunately, some tribes have exploited this exemption, leading non-tribal purchasers to believe they do not owe the sales, fuel or excise taxes on these transactions, since the tribes do not charge them. The steep discount price is a powerful lure attracting customers from nearby non-tribal businesses (and even from great distances). Thus, the tribes can sell gasoline without charging the typical $.20-.30 per gallon state fuel tax, or the $.40-.60 per pack cigarette tax. The first problem is that **this drives legitimate, tax-paying competition out of business for miles around**. The second problem is that **it destroys the tax base** that states and cities use to finance roads, schools, parks, housing, etc.

The problem is rapidly getting worse.[2] Currently, the State of **New York** estimates tax losses **at $65**

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taxation."

"Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."

"We reject the proposition [that] the 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

"In particular, these cases [cites precedents] have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non Indians."

(*Department of Taxation and Finance of New York v. Attea*, June 13, 1994)

"We conclude that under the doctrine of tribal sovereign immunity, the state may not tax such sales to Indians, **but remains free to collect taxes on sales to non tribal members.**"

"**Congress has always been at liberty to dispense with such tribal immunity or to limit it.**"

(*Oklahoma Tax Commission v. Potawatomi*, Feb. 26, 1991)

"But if the legal incidence of the tax rests on the non-Indian, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose the tax."

(*Oklahoma Tax Commission v. Chickasaw*, June 14, 1995)

[2] The threat is greater to the tax bases than to businesses, because some businesses are protecting themselves by making agreements with the tribes. They enter into a partnership so an existing business becomes tribal property, gaining the trust status and tax advantages, with the extra profits then split. It works under the "If you can't beat 'em, join 'em" theory. It is attractive for many businesses. For example, one business with 40 gasoline stations in Oklahoma was offered a deal with a tribe, which showed it how this special arrangement could try to evade dozens of different taxes and regulations, saving the business over $3-million per year. But whenever a business does so, it increases and accelerates the problem of unfair

million for untaxed cigarettes and **$35 million for untaxed motor fuels**, **Washington State** is losing **$63 million** per year on **untaxed cigarettes**, **Michigan** is losing **$103 million** per year in **cigarette, motor fuel** and **general use taxes, Oklahoma** is losing **$27 million** per year in **cigarette taxes, California** is losing between **$30-$50 million** per year in **cigarette taxes, Kansas** is losing **$3 million** per year in **cigarette and motor fuel taxes**, **New Mexico** is losing **$4.5 million** in **motor fuel taxes**, and **Wisconsin** is losing **$6 million.** These **losses are to the state treasuries only**; they do not include revenue lost to local governments. The total national loss likely surpasses **$1 billion annually**.

Some have made the argument that many of the Tribes have existing agreements in place so their is no reason for legislation. Often opponents cite the figure of 200 tribes in 18 States as having tax compacts. This is a deceiving argument. This figure comes from a 1995 the Arizona Legislative Council study of State-Tribal tax compacts. What these people are not telling you is that the 200 figure counts many tribes 2, 3, 4, or even 5 times so that the total possible is 960, which is ridicules because there are fewer than 260 tribes in the lower 48 States. What this study DOES reveal is that only 20.8% of the Tribes have compacts on cigarettes, motor fuels, liquor, sales/use, or other tax categories. I attach a summery from the Arizona Legislative Council study for the record. To those States and tribes which have acted responsibly I congratulate you, but the overriding fact is that relatively few tribes actually have tax compacts with the States.

Additionally, some have made the argument that Oklahoma no longer has a problem with Tribal compacts. While it is true that Oklahoma has compacts with some Tribes on cigarette and motor fuel, a majority of the Tribes are not members of the compact. Moreover, some Tribes are importing untaxed motor fuel into the State in violation of the motor fuel tax compact. Due to the nature of Tribal sovereign immunity the State has little recourse with this violation of the motor fuel compact. Additionally, the federal Bureau of Alcohol, Tobacco, and Firearms (BATF) has an ongoing investigation into the evasion of Oklahoma state cigarette taxes

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competition, and further diminishes the tax base. There is no corresponding "escape" for state or local governments.

by non-compact Indian tribes who are selling cigarettes tax free to non-Indians. The BATF estimates Oklahoma is losing $27 million per year due to this tax evasion.

Exacerbating this situation is that many of the tribes which have acted responsibly and have enacted tribal taxes, or have entered into tax compacts with the State cannot always enforce the collection of those taxes on trust land held for an individual Indian. I cite a recent example from upstate New York where the Tribe, after years of effort to collect the Tribal tax from a business owned by an individual Indian, eventually bulldozed four smokeshops for failure to collect the Tribal tax.

The problem is accelerating as tribes acquire retail business property in areas previously not associated with the tribes, creating a patchwork quilt of businesses where customers can avoid paying the routine taxes which all other businesses must charge and collect. This not only creates grossly unfair competition, but it robs states and communities of the revenues which are necessary to fund our schools, our roads, public safety, public health and other key services provided by state and local government. By ownership, lease or operating agreements, the Tribes can use the property to operate truck stops, gasoline stations, convenience stores and retail outlets **without charging state or local fuel, sales, or excise taxes**.

Once land is transferred by the federal government into trust, this problem is not reversible. The law permits the BIA to transfer land into trust at any location. It need not be adjacent to any tribal lands, nor be part of any former or claimed tribal property, nor even be in the same area or state where the tribe may be. The quantity of land and the location are unrelated to the population of the tribe, or to its economic circumstance.[3]

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[3] Indeed, as the U.S. Eighth Circuit Court of Appeals has ruled, the current federal law is so loose that, "By its literal terms, the statute permits the Secretary [of Interior, who oversees the BIA] to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be "for Indians." (*State of South Dakota v. U.S. Department of the Interior*, 69 F.2d 878, 1995.) The Eighth Circuit declared the underlying act of Congress unconstitutional; unfortunately the U.S. Supreme Court did not address the issue, but remanded the case to consider other

The key is to prevent such transfers before they happen, except for tribes who agree to collect and remit taxes paid by their customers, the same as all other American businesses must do.

As the U.S. Supreme Court has stated, the problem does not involve Indian tribes' claims of "sovereign immunity", nor our treaty obligations with Indian tribes. (See Footnote 2.) As Supreme Court decisions have made clear, it is Congress which has created this problem. Therefore, it is Congress which must correct it.

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factors.

Table 12.1: Summary of State-Tribal Alternative Taxation Methods

State	Land Use Rights on State	Authority to Enter into Agreement Under Law or Has Entered into Agreement with State Before			Shared Revenue or Tax Base			Share Land Base Revenue Sharing Plan	Revenue or Tax Base Sharing Agreement					Authority Regarding Taxation Agreements
	#	Yes (Cite) or No	Type of Taxes	Public Exempt	Yes (Cite) or No	Cigarette Tax	Fuel Excise Taxes	Yes (Cite)	Sales/Use	Cig/Tob	Liquor	Motor Fuel	Other	Yes (Cite) or No
CO	2	No	—	—	No	—	—	Yes[a]	2	2	—	—	—	No
FL	2	FS 210.05(5)	Cigarette	All[b]	No	—	—	No	—	—	—	—	—	No
LA	3	No	—	—	No	—	—	Yes	2[c]	2	—	2	—	No
MI	10	No	—	—	No	—	—	Yes	4[d]	4	—	4	4[e]	No
MN	11	No	—	—	No	—	—	Yes	8	11	10	8	—	MS 270.60
MS	1	MCA 27-65-215	Sales; Gross Receipts	All	No	—	—	No	—	—	—	—	—	MCA 27-65-217
MT	7	No	—	—	MCA 16-11-111	Cigarette	5	Yes	—	6	2	6	—	MCA 18-11-101 Thru -112 (General Coop. Agreemts.); MCA15-70-234 (Motor Fuel)
NV	24	NRS 372.805 & R320.271(Sales) NRS 370.515 & R370.210 (Cig/Tob)	Cigarette & Tobacco; Sales & Use	All	No	—	—	Yes[f]	10	13	—	—	—	No
NM	23	NMSA 7-12-4	Cigarette	All	No	—	—	No	—	—	—	—	—	No
ND	5	No	—	—	No	—	—	Yes	—	1	—	—	—	NDCC 54-40.2-02
OK	39	No	—	—	No	—	—	Yes	—	16	—	—	—	OS Title 68, SEC. 346(1c)

State	Tribal Reg. Issued by State	Sovereign Immunity Limited (Tribal Immunities and Reservations Subject to State Taxes)			State's Ability to Tax Indians			State-Tribal Agreements Allowed	Agreements with Tribes					Statutory Authority Other Tribal Agreements
		Yes/No	Specific Taxes	Parties Exempt	Yes/No	Specific Tax	Specific Tribe	Yes/No	Sales Tax	Cig Tax	Liquor	Motor Fuel	Other	Yes/No
OR	9	No	—	—	No	—	—	Yes	—	2	—	—	—	ORS 323.401(Cig) ORS 323.615(Tob)
SD	9	No	—	—	No	—	—	Yes	4	4	—	—	4[g]	SDCL 10-12A
UT	8	R-865-13G-10	Motor Fuel	Tribal Government Use Only	No	—	—	Yes	—	1	—	—	—	No[h]
WA	26	No	—	—	WAC 458-20-192	Cigarette	18	Yes	—	—	7	2	—	No[i]
WI	11	Yes[f]	Motor Fuel	Indians Only	No	—	—	Yes	—	11	—	—	—	WSA 139.325
WY	2	No	—	—	No	—	—	Yes	—	1	—	—	1[k]	No

a. Colorado's two tribes have informal cooperative *arrangements*—not formal agreements—with the state for the collection of state cigarette and sales taxes from on-reservation sales to non-Indians.

b. The exemption applies to cigarette purchases only on *Seminole* tribal lands.

c. The sales and use tax exemption addressed in the agreements pertains *only* to motor vehicles owned by the tribe.

d. The *sales* tax portion of the agreement provides for both the refund of the regular sales tax as well as for an exemption from sales taxes on major purchases (e.g., boats, cars, homes). The *use* tax portion exempts tribal councils and on-reservation members from taxation on telephone service and on-reservation title transfers of motorized vehicles.

e. Agreements also address a single business tax (e.g., a value-added corporate income tax).

f. These agreements are of little practical effect, but are a formality showing that tribes have enacted their own tax whereby the state does not collect corresponding state taxes on these reservations. Thus, the number of "exempt" tribes (i.e., those imposing their own tribal tax) may differ from the number of tribes with agreements. This chart indicates tribes imposing their own tax.

g. All four of South Dakota's compacting tribes have agreements for collection and revenue sharing of a contractor's excise tax.

h. A memorandum of understanding was signed in December, 1994 by the Governor of Utah, the commission chairs of Duchesne & Uintah counties, and the business committee chair of the Ute Indian Tribe of the Uintah & Ouray Reservation. This document recognizes negotiation between the parties as the preferred method of resolving disputes and establishes procedures for future negotiations.

i. HB 1955, introduced in the 1995 legislative session, would have authorized the state to enter into revenue sharing agreements with tribes. This legislation did not pass.

j. This exemption is not implemented by statute or regulation, but rather is utilized by the Department of Revenue as a matter of policy pursuant to its interpretation of case law holdings.

k. A severance tax agreement exists between the Wyoming Department of Revenue and the Shoshone and Northern Arapaho Tribes that is the outcome of a court settlement.

Senate Indian Affairs Committee
Questions for the Record
Submitted to Congressman Istook

Question 1:

Has the State of Oklahoma ever calculated the economic advantages it receives as a result of the tribal lands in the state, including tourism and accelerated depreciation from non-Indian business under the Federal tax code?

Response:

I am not aware of any recent calculations of the economic advantages Oklahoma receives as a result of having tribal lands in Oklahoma.

Question 2:

I understand the State of Oklahoma has changed the legal incidence of its motor fuel tax so that it is paid at the wholesale level and that, as a result, tax revenues have jumped significantly. Can you comment on this development?

Response:

I attach a chart from the Oklahoma Tax Commission detailing tax revenues for the first 12 months of the Oklahoma State Tax Compact. [attachment 1] The chart shows that revenues, after payments to tribes, have increased about 2.6 % since the inception of the tax compacts. For comparison I attach a study by the Petroleum Marketers Association of America which discusses the effect of changing the point of taxation to the refinery nation-wide. [attachment 2]

Question 3:

It has been stated that there are bigger problems in halting illegal, out-of-state (non-Indian) shipments that do not include payment of state sales taxes. Can you comment?

Response:

I have made inquiries with the Oklahoma Tax Commission (OTC) about the illegal, untaxed, out-of-state motor fuel shipments by non-Indians. The OTC informs me that they are unaware of any attempts by non-Indians to import illegal, untaxed motor fuel.

Question 4 [From Chairman Campbell]:

Chairman Campbell:

Did you research each state to get those statistics? [from page two of my written testimony dealing with tax loss]

Response:

This information was gathered three ways:

First, my staff called every State Tax Commission and asked if the State was losing tax revenue on sales of retail items to non-Indians from non-compact tribal businesses located on Indian trust lands.

Second, the Bureau of Alcohol, Tobacco, and Firearms compiled a study of tax loss due to the evasion of state cigarette taxes by non-compact smokeshops. I attach a copy of the study. [attachment 3]

Additionally, on January 30 of this year I wrote to all State Tax Commissions requesting information about tax loss due to the sale of untaxed items by non-compact tribal businesses. To date, however, I have not received responses from all tax commissions. I attach a copy of my January 30 letter. [attachment 4]

Attachment 1

OKLAHOMA TAX COMMISSION
MOTOR FUEL COLLECTIONS ANALYSIS SINCE HB 2208
FOR THE FIRST 12 MONTHS - NOVEMBER 1996 THROUGH OCTOBER 1997

Gasoline & Diesel Combined

Month	Fuel Payments Previous Year (Old Law)	Fuel Payments Current Year (New Law)	Variance	Reduction For Amount Retained For Tribes	Net State Increase (Decrease)
November	28,027,913	30,532,711	2,504,798	915,981	1,588,817
December	27,608,514	29,570,103	1,963,589	887,103	1,076,486
January	29,206,639	31,081,661	1,875,022	932,450	942,572
February	27,143,729	28,012,635	868,906	840,379	28,527
March	26,682,756	26,806,617	123,861	804,199	(680,338)
April	27,143,729	30,503,542	3,359,813	915,106	2,444,707
May	29,702,455	32,514,038	2,811,583	975,421	1,836,162
June	31,077,751	32,033,093	955,342	960,993	(5,651)
July	32,041,125	31,982,720	(58,405)	1,279,309	(1,337,714)
August	29,923,008	32,502,557	2,579,549	1,300,102	1,279,447
September	30,046,257	32,177,465	2,131,208	1,287,099	844,109
October	28,629,742	31,099,520	2,469,778	1,243,981	1,225,797
	347,231,618	368,816,662	21,585,044	12,342,122	9,242,922

Attachment 2

TAX EVASION AND THE POINT OF COLLECTION

John J Huber, Vice President and Chief Counsel, Petroleum Marketers Association of America
Ethel Hornbeck, Hornbeck Energy Research Services

There's hardly an issue of greater concern to marketers than the collection of taxes and ensuring that everyone who is selling fuels is paying the same tax. In the late 1980's and early 1990's, marketers, the Department of Justice and the Treasury Department all approached Congress with the goal of eliminating tax evasion. These efforts culminated in the passage of the Omnibus Budget Reconciliation Act of 1993 which moved the point of collection for diesel fuel to the terminal rack and imposed a dye system for this fuel. The Internal Revenue Service claims that the change in the point of collection for diesel fuel at the federal level has substantially increased tax revenues, although this has undoubtedly been at least partially offset by the need to hire several hundred additional agents to enforce this new system. But for marketers, the new system has meant increased paperwork burden and storage and distribution problems.

Following the federal lead, a number of states have already adopted a rack point of collection for diesel taxes, and several more are considering implementing such a system. The impetus for making such a change seems to be the assumption that changing the point of collection will result in a net increase in tax collections. Certainly that is the promise and hope of many state tax officials, but is it a reality? To assess whether the movement in the point of collections does, in fact, guarantee increased revenues, we examined tax collections as reflected by sales volumes reported by state tax agencies in 1993, 1994, 1995, and 1996.

If the change in collection procedure had the large positive impact on revenues claimed by proponents, then a movement in the point of collection should result in an immediate, measurable and observable increase in taxable sales. Sales data do not, in fact, show any discernible pattern in states that have made a change compared with states that have not. The attached table shows state level taxable sales of diesel fuel for the period 1993 through 1996 as collected by the Federal Highway Administration. (1997) data is still being processed. Effective dates are indicated for those states that have changed their point of collections to the terminal rack.

Nine states listed have changed the point of collection during the period shown. One state (California) changed its system during 1995, and five additional states made the change during 1996. While this results in limited data for making cross comparisons, the information does not show any consistent pattern.

During 1996, diesel fuel sales for the United States increased nearly 4 percent compared with 6.8 percent in the previous year. In California, which changed its collection procedure in mid-1995, 1996 sales increased 0.9 percent, sales during 1995 increased 3.6 percent (less than the national average), and sales in 1994, before the change, increased at more than twice the national average. In South Carolina and Florida, each of which changed their collection system during the year, sales decreased in 1996. Following January 1996 changes, sales in North Carolina increased 2.5 percent, less than the national average, while in South Dakota the increase in sales was just about the same as the change at the national level. In Iowa, sales continued to increase for the third straight year.

Conversely, there were quite a few states that made no tax collection change that experienced unusually large changes in diesel sales during that period. In fact 10 states (that made no change) reported increases in diesel sales in excess of 10 percent.

Although the evidence remains limited, there is still not a consistent pattern of increasing sales that can be attributed to changes in tax collection procedures. Rather it would appear that other variables will have a stronger impact on tax collections. These may include the growth in the economy, better enforcement, or perhaps changes in the analytical method for collecting the data. Thus, the promise of improved collections through a change in a collection procedure is likely to be a hollow if not false promise.

A switch to the terminal rack also may impact the type and amount of enforcement. When the federal system was switched, resources were dedicated to the on-road enforcement system and several hundred inspectors were hired for this task. Additionally, closer monitoring and inspection of terminals was required. Thus, a state that switches to the rack will have to place new emphasis on both on-road enforcement and terminal level compliance. The question arises whether the state will be able to eliminate the downstream enforcement activities such as auditing service stations, truckstops, trucking companies or marketers.

It is our opinion that audits of these downstream facilities will still be necessary. Unlike the federal system which has a uniform tax nationwide, states have taxes on diesel ranging from 7.5 to 27.5 cents per gallon or a difference of 20 cents per gallon. If cheating on excise taxes of 24 cents a gallon resulted in evasion approaching $1 billion per year, we would certainly anticipate that the differentials in state taxes will continue to provide sufficient incentive to evade taxes. Of particular concern are tracking and monitoring gallons that enter a terminal, leave a terminal, and are distributed either in that state or in an adjacent state. Without this information it will be impossible to determine whether the gallons have been assessed the correct tax. Further, while it may not be necessary to process information returns regarding this information, all facilities need to have the information and the states must be willing and able to conduct thorough audits to ensure all taxes have been paid. It is our opinion that without such audits which will continue to require significant manpower, the system is essentially waiting for persons to develop a scheme to exploit this differential and evade taxes.

In conclusion, the decision as to whether the point of collection should be moved is a decision that is best made by evaluating the current tax system in the state and its effectiveness. There is no clear evidence suggesting that a collection change will result in an automatic increase in tax collections. In collecting motor fuel taxes, there are no sure bets. The amount of tax, the differentials between states and the experience of organized crime in this area will continue to make evading these taxes attractive to the unscrupulous and the criminal element. If statutory changes were adequate to control behavior, bootlegging would not have occurred during prohibition, and no illegal drugs would be flowing into the United States in the 90's.

SALES OF SPECIAL FUELS, BY STATE, 1993-1996 (000000 GALLONS)

	1993	1994	1995	1996	%CH94	%CH95	%CH96	%CH93-96
AL	587.4	659.0	696.4	650.7	12.2	5.7	-6.6	10.8

AK	142.5	30.4	79.9	35.1	-78.7	162.8	-56.1	-75.4
AZ-1/98	474.5	463.5	484.3	545.7	-2.3	4.5	12.7	15.0
AR	428.0	472.2	490.8	497.7	10.3	3.9	1.4	16.3
CA-7/95	1,853.3	2,035.6	2,109.7	2,129.1	9.8	3.6	0.9	14.9
CO	263.5	269.3	265.8	274.9	2.2	6.1	-3.8	4.3
CT	197.3	186.5	200.7	321.0	-5.5	7.6	59.9	62.7
DE	55.1	62.3	63.4	59.7	13.1	1.8	-5.8	8.3
DC	20.9	21.9	21.4	21.1	4.8	-2.3	-1.4	1.0
FL-7/96*	932.5	963.4	1,004.0	971.0	3.3	4.2	-3.3	4.1
GA	1,003.7	1,050.2	1,115.6	1,355.2	4.6	6.2	21.5	35.0
HI	26.0	31.7	27.5	40.8	21.9	-13.2	48.4	56.9
ID	164.5	160.4	169.1	189.0	-2.5	5.4	11.8	14.9
IL	1,012.3	734.8	1,124.6	891.4	-27.4	53.1	-20.7	-11.9
IN-10/93	855.5	937.7	978.2	1,042.8	9.6	4.3	6.6	21.9
IA-1/96	349.3	380.6	413.9	462.0	9.0	8.7	11.6	32.3
KS	321.4	300.4	345.9	355.3	-6.5	15.1	2.7	10.5
KY	689.0	590.6	582.1	598.5	-14.3	-1.4	2.8	-13.1
LA	409.7	446.7	484.9	511.6	9.0	8.6	5.5	24.9
ME	115.5	129.5	130.7	136.2	12.1	0.9	4.2	17.9
MD	343.3	310.9	326.0	357.7	-9.4	4.9	9.7	4.2
MA	271.4	298.1	316.3	315.1	9.8	6.1	-0.4	16.1
MI-1/93	726.7	731.5	742.7	778.4	0.7	1.5	4.8	7.1
MN	374.9	422.1	457.3	485.2	12.6	8.3	6.1	29.4
MS	349.1	362.2	376.2	403.7	3.8	4.4	6.7	15.6
MO	691.1	736.8	743.4	772.2	6.6	0.9	3.9	11.7
MT	139.4	156.7	159.8	141.5	12.4	1.9	-11.3	1.5
NE	260.5	265.8	314.4	338.9	9.7	10.0	7.8	30.1
NV*	176.3	174.7	176.7	246.2	-0.9	1.1	39.3	39.6
NH	53.9	56.6	63.6	61.3	5.0	12.4	-3.6	13.7
NJ	460.8	561.9	490.5	534.8	22.0	-12.7	9.0	16.1
NM-1992	241.5	226.1	309.0	316.6	-6.4	36.7	2.5	31.1
NY	863.2	917.3	921.8	931.0	6.3	0.5	1.0	7.9
NC-1/96	666.3	772.0	780.5	799.9	15.9	1.1	2.5	20.1
ND	111.5	131.5	134.4	137.1	17.9	2.2	2.0	23.0
OH	1,000.3	1,115.3	1,203.5	1,283.5	11.5	7.9	6.6	28.3
OK-10/98	433.0	478.3	497.8	544.8	10.5	4.0	9.5	25.8
OR	349.1 **		356.0	388.7 **	**		9.2	11.3
PA-10/97	1,092.5	1,155.8	1,204.7	1,177.5	5.8	4.2	-2.3	7.8
RI	38.4	42.2	44.5	44.6	9.9	5.5	0.2	16.1
SC-5/96	410.0	524.4	463.6	461.2	27.9	-11.6	-0.5	12.5
SD-1/96	114.5	137.4	137.6	143.0	20.0	0.1	3.9	24.9
TN-1/98	648.2	678.4	730.1	755.8	4.7	7.6	3.5	16.6
TX	1,705.5	1,964.4	1,958.4	2,170.7	15.2	-0.3	10.8	27.3
UT	191.1	211.4	260.1	256.8	10.6	23.0	-1.3	34.4
VT	70.6	74.0	86.8	96.1	4.8	17.3	10.7	36.1
VA	629.6	682.2	690.9	760.7	8.4	1.3	10.1	20.8
WA	352.7	465.3	466.8	462.5	31.9	0.3	3.3	36.7
WV	212.8	212.8	221.9	133.7	0.0	4.4	-39.7	-37.1
WI-4/94	522.6	565.6	569.9	601.9	8.2	4.3	2.0	15.2
WY-1/97	207.8	196.8	214.9	239.2	-4.3	8.1	11.3	15.1
US*	23,610.2	24,576.7	26,250.5	27,249.0	4.1	6.8	3.8	15.4

* 1996 estimated from partial data.

**Data not available.

Dates are the effective date of changes in point of collection to rack except PA which moved to wholesale point of collection.

Gross sales volumes of special fuels, primarily diesel fuel, reported by State motor fuel tax agencies. In many cases data reflect retail sales but some states tax these fuels at the wholesale level.

Source: Federal Highway Administration

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1992

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL TAX REPORTS

(GALLONS)

TABLE MF 33SF
MAY 1994

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	45,906,986	46,791,301	53,304,903	46,006,103	43,132,882	43,907,779	53,725,874	38,686,010	47,563,740	63,485,196	36,504,335	44,946,101	584,039,008
Alaska	3,603,391	3,435,956	4,024,407	4,159,062	4,617,846	4,697,635	4,722,569	4,622,632	4,308,669	4,134,118	3,705,247	3,790,024	49,866,735
Arizona	38,096,833	25,052,067	33,137,716	24,619,973	35,468,109	31,417,131	25,175,823	31,584,434	19,106,386	36,267,197	28,939,532	24,737,240	362,180,841
Arkansas	23,038,015	37,139,280	39,276,243	30,766,182	33,261,867	34,563,227	28,006,746	40,149,641	39,339,175	8,588,789	59,169,587	31,641,783	406,640,424
California	178,906,000	163,277,000	162,052,000	158,816,000	162,219,000	178,699,000	179,988,000	168,339,000	160,826,000	164,126,000	146,918,000	184,575,000	1,908,741,000
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	11,332,811	11,082,403	21,307,611	12,757,628	10,957,852	21,777,490	13,092,364	13,326,253	22,067,019	16,098,438	13,270,584	22,239,007	189,394,568
Delaware	4,490,662	4,263,467	3,134,353	5,015,648	4,061,353	4,084,613	5,980,500	2,933,578	3,527,010	4,352,332	3,784,771	52,302,606	
Dist. of Col	1,642,323	1,495,917	1,832,762	1,804,644	1,547,477	1,861,520	1,929,423	1,811,278	1,832,422	1,499,233	1,795,927	21,051,699	
Florida	70,968,864	76,081,862	81,614,107	77,309,557	72,661,950	82,026,010	70,180,931	70,453,379	79,904,090	75,064,513	78,103,048	87,566,926	921,930,236
Georgia	78,975,096	66,400,426	77,540,126	76,124,734	73,165,672	80,966,612	72,167,606	67,719,153	84,600,746	81,718,048	71,937,273	82,474,334	888,773,706
Hawaii	1,980,535	2,408,111	2,181,703	1,864,626	2,530,993	1,493,950	2,466,199	2,162,545	2,266,780	1,710,942	3,291,137	1,527,861	25,912,482
Idaho	9,507,352	14,119,400	8,532,700	8,930,134	12,783,643	8,798,590	9,122,981	15,687,810	7,082,729	12,111,304	15,252,924	8,139,762	130,069,329
Illinois	56,359,072	56,338,156	61,752,781	58,390,957	60,863,528	112,082,222	70,688,925	65,749,917	121,916,054	74,809,446	64,244,584	115,311,833	918,597,870
Indiana	99,952,127	21,700,386	73,171,436	51,974,013	91,751,634	71,835,304	54,342,886	56,525,441	143,981,946	21,405,351	64,616,242	77,497,819	760,719,585
Iowa	25,567,883	25,247,781	23,978,235	32,988,249	26,369,685	32,957,258	23,973,363	24,675,883	32,679,926	28,967,866	26,702,273	28,486,939	332,502,089
Kansas	16,816,751	22,188,539	21,166,434	22,346,121	24,864,470	23,756,880	21,215,189	21,487,602	24,112,420	9,813,898	34,066,612	23,638,503	265,462,408
Kentucky	45,330,574	32,602,316	48,150,818	56,516,868	29,825,222	50,278,231	49,307,611	51,880,719	49,970,906	59,468,641	28,017,360	37,683,077	539,012,333
Louisiana	29,989,167	18,614,834	27,254,004	28,404,798	26,094,361	45,220,160	32,147,281	27,529,971	42,932,400	24,049,719	22,444,239	27,084,573	351,535,447
Maine	14,166,648	8,525,900	7,080,896	12,865,561	3,321,709	6,492,536	12,063,219	11,726,668	6,007,208	15,664,688	9,589,743	6,854,508	114,338,809
Maryland	21,977,307	20,363,675	38,483,287	24,882,346	24,080,008	41,876,606	24,085,602	21,113,902	39,252,710	25,215,390	24,846,415	38,897,086	345,062,514
Massachusetts	19,031,401	18,353,308	10,795,811	21,071,216	30,142,263	24,726,198	19,804,680	15,361,730	25,464,529	24,306,523	19,219,014	26,043,149	254,321,820
Michigan	53,664,132	27,180,796	68,648,493	35,350,783	30,610,851	78,232,146	37,099,915	31,704,467	78,911,783	31,983,302	37,407,848	70,362,999	570,147,510
Minnesota	26,457,161	25,590,268	27,701,803	26,448,146	31,077,980	30,812,761	28,869,088	32,211,973	35,219,136	30,520,615	32,773,927	36,470,942	364,153,760
Mississippi	30,933,308	22,099,589	28,960,607	33,757,338	23,128,040	27,818,236	36,253,918	24,638,706	29,205,350	36,707,932	26,193,236	27,327,134	346,022,861
Missouri	50,379,512	38,863,940	57,339,508	57,460,462	50,641,627	51,771,009	74,012,579	49,171,421	62,097,323	62,348,147	39,639,908	57,366,113	651,086,549
Montana	8,355,339	10,644,150	10,511,021	12,242,895	10,684,405	9,044,731	10,478,490	9,010,620	11,666,056	11,686,357	12,091,694	8,990,268	126,314,035
Nebraska	21,309,042	18,178,476	17,971,352	24,254,289	20,085,459	21,630,763	19,367,978	21,367,978	21,011,702	24,531,581	20,027,308	20,914,975	290,631,708
Nevada	10,577,779	11,665,674	14,938,969	7,698,799	17,544,801	12,900,317	6,952,560	14,689,686	15,504,612	10,105,160	15,591,912	13,967,277	153,937,436
New Hampshire	6,539,023	2,831,738	4,457,131	4,852,402	3,318,084	4,846,388	4,263,152	3,595,324	3,858,099	5,587,918	3,230,810	3,893,009	51,273,078
New Jersey	28,682,261	31,660,766	30,975,702	22,321,122	35,850,156	25,504,917	11,075,963	29,947,646	36,610,126	39,302,326	40,177,570	35,733,644	374,846,197
New Mexico	51,505,251	4,960,254	1,086,118	49,534,033	3,266,400	2,242,813	52,171,381	1,463,144	3,741,872	52,984,034	2,526,261	2,590,642	228,072,009
New York	58,918,416	66,323,700	73,164,240	68,042,257	75,107,174	75,621,582	66,846,615	74,841,182	75,867,664	72,929,810	58,901,949	71,980,176	838,524,774
North Carolina	49,014,412	44,015,932	56,631,869	60,420,120	49,384,588	58,330,466	64,587,764	42,398,068	55,569,524	45,836,326	75,390,778	45,086,891	646,668,730
North Dakota	7,046,112	6,452,639	8,004,024	7,636,528	8,986,621	8,660,322	8,542,330	8,783,649	9,658,298	10,352,084	9,477,638	8,868,886	102,116,631
Ohio	91,491,560	56,621,297	87,418,008	92,699,770	53,612,429	89,384,107	91,001,894	61,286,790	89,187,676	95,692,623	82,478,219	81,756,349	971,630,412
Oklahoma	31,044,458	30,561,635	36,443,878	32,182,437	31,354,882	33,309,717	36,418,302	32,664,858	35,862,221	35,497,084	30,240,946	32,846,254	398,416,672
Oregon	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,756	27,757,799	333,093,075
Pennsylvania	75,645,971	71,634,662	87,975,565	78,843,297	77,198,170	94,813,530	77,465,088	77,973,646	94,086,900	84,716,728	77,889,085	93,519,939	991,762,576
Rhode Island	2,924,734	2,924,734	2,924,734	3,569,894	3,569,894	3,569,894	3,259,612	3,259,612	3,259,612	3,557,510	3,557,510	3,557,510	39,936,290
South Carolina	30,124,927	26,998,496	30,735,518	38,903,735	24,564,962	44,073,065	29,377,220	28,481,945	30,771,260	40,055,175	28,314,027	38,346,018	388,843,333
South Dakota	8,233,810	7,631,672	8,138,801	8,513,172	8,844,775	8,979,586	9,237,356	9,637,876	9,740,424	10,226,078	8,798,976	8,746,594	106,726,117
Tennessee	51,510,078	32,760,542	69,332,093	54,866,137	39,618,343	58,767,617	52,031,756	54,582,210	54,582,210	67,751,521	46,928,465	59,977,227	
Texas	120,674,374	140,932,994	138,856,834	139,903,987	122,666,778	161,773,353	121,306,056	132,447,149	142,450,648	133,357,964	157,521,362	142,882,840	1,634,543,135
Utah	22,503,289	9,302,637	9,630,874	19,757,274	12,794,774	10,615,142	8,348,574	16,408,289	10,391,584	19,218,810	23,254,268	19,204,989	181,825,404
Vermont	2,843,526	6,766,881	5,461,900	4,878,148	7,137,295	2,923,271	3,396,632	9,063,639	2,763,844	3,327,571	9,541,339	1,718,131	69,821,417
Virginia	46,508,666	43,028,366	50,577,403	60,041,791	48,469,469	56,137,023	51,863,441	43,467,797	53,748,301	53,489,324	39,904,206	56,258,164	592,653,451
Washington	33,919,402	24,153,611	34,041,591	28,566,631	26,329,927	48,468,488	29,789,601	27,215,779	20,947,945	28,413,930	48,402,146	34,998,246	389,236,877
West Virginia	22,952,333	14,467,675	8,043,093	24,666,771	14,645,814	16,493,541	11,632,730	19,142,978	14,095,099	25,447,563	14,898,868	12,786,338	198,771,705
Wisconsin	37,726,294	36,465,311	44,416,630	39,685,701	31,333,073	41,138,437	40,323,264	41,476,435	41,842,231	44,302,944	41,143,409	44,634,382	484,488,111
Wyoming	13,951,418	14,106,564	14,601,001	15,796,348	13,389,149	14,610,093	12,904,008	16,596,013	9,483,693	16,147,161	18,180,264	14,218,198	173,983,890
U.S. Total	1,815,708,451	1,544,417,926	1,814,350,817	1,864,302,452	1,695,120,833	2,024,888,810	1,804,090,406	1,702,379,438	2,060,980,867	1,881,868,530	1,815,135,957	1,932,906,919	21,961,241,515
Puerto Rico	4,807,750	7,379,025	4,633,925	10,981,500	6,455,500	7,290,975	10,232,750	7,470,375	12,773,625	5,803,750	9,002,400	8,875,425	95,691,000
Grand Total	1,820,606,201	1,551,796,951	1,818,984,742	1,875,263,952	1,701,576,333	2,032,179,785	1,814,323,245	1,714,849,813	2,073,754,512	1,887,672,280	1,824,138,357	1,941,786,344	22,056,932,566

1/ This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year-end analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels at the wholesale level. In some cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels by month is reported in table MF 25 in the annual report, *Highway Statistics*.

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1993[1]

COMPILED FOR THE CALENDAR YEAR FROM STATE FUEL-TAX REPORTS

(GALLONS)

TABLE MF-33S APRIL 1995

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	57,274,159	52,366,280	48,404,900	62,342,008	57,723,641	62,466,327	57,811,358	57,766,396	48,233,072	64,748,552	58,062,500	60,489,950	687,288,136
Alaska	9,802,682	9,489,666	11,270,760	11,797,963	12,094,888	13,222,838	13,379,574	13,792,788	12,581,644	12,097,167	10,686,864	11,270,760	142,487,679
Arizona	42,419,097	40,016,487	49,860,739	39,115,460	32,864,871	34,489,193	39,071,387	48,586,438	36,091,617	38,143,810	33,348,734	44,890,892	474,498,927
Arkansas	11,908,189	10,119,863	34,784,277	30,921,262	36,430,132	40,186,843	44,561,878	24,829,692	47,130,943	12,296,740	52,605,597	44,322,490	427,072,138
California	133,081,000	142,607,000	167,494,000	158,977,000	137,333,000	154,993,000	144,338,000	164,578,000	174,948,000	140,510,000	140,760,000	194,068,000	1,865,379,000
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	11,437,459	11,794,936	20,819,936	13,183,087	14,009,436	23,610,343	14,066,299	13,696,680	22,667,274	13,462,288	14,796,394	24,210,040	197,386,546
Delaware	3,917,540	4,019,148	3,887,646	4,766,066	6,153,980	4,466,637	5,892,876	4,249,862	2,439,849	3,413,434	7,207,621	3,804,438	58,134,899
Dist. of Col.	1,629,742	1,886,272	1,639,881	1,749,814	1,864,693	1,847,913	1,884,878	1,779,870	1,731,091	1,738,014	1,666,119	1,764,484	21,672,971
Florida	80,788,675	68,948,102	91,043,309	78,743,668	61,477,364	91,120,320	86,439,663	72,396,000	76,360,730	76,258,498	78,662,719	82,564,288	932,513,370
Georgia	87,170,970	86,815,874	84,327,628	87,090,702	75,685,923	93,366,617	83,370,511	72,802,322	79,356,378	79,415,022	68,540,481	86,225,531	1,028,068,109
Hawaii	2,084,178	2,009,978	1,874,191	2,648,271	1,871,751	2,305,818	2,108,576	2,216,662	2,029,375	2,484,941	2,681,999	7,076,061	36,083,981
Idaho	6,917,328	14,637,366	26,298,724	13,957,633	8,149,857	13,161,190	13,086,476	11,684,071	13,326,798	14,709,885	14,706,286	16,496,192	164,940,981
Illinois	60,446,488	62,048,414	114,083,877	66,467,368	64,255,836	119,845,394	65,126,889	69,716,979	124,066,784	75,615,999	74,042,454	119,961,454	1,012,382,629
Indiana	36,401,363	72,524,289	66,168,369	54,339,781	67,503,883	136,804,701	74,979,110	46,351,219	73,448,761	68,663,968	64,916,169	76,438,963	880,540,988
Iowa	39,671,663	23,600,327	52,498,382	27,082,286	27,616,199	32,737,383	26,129,630	27,747,814	33,299,278	28,995,164	28,318,259	33,897,986	381,595,186
Kansas	13,210,347	27,739,199	28,781,243	22,975,541	24,980,230	19,252,985	40,039,967	27,300,604	28,388,646	17,917,086	23,118,439	33,660,091	331,364,918
Kentucky	17,181,462	98,041,949	121,672,638	88,306,479	38,402,949	31,785,788	88,278,153	63,173,707	59,147,321	99,156,888	89,140,045	85,849,633	689,004,286
Louisiana	48,268,502	36,538,736	46,138,674	34,277,620	30,806,884	39,306,638	40,419,816	31,412,166	26,871,979	40,953,887	33,681,547	31,868,746	409,665,595
Maine	13,099,759	10,636,080	2,662,936	12,306,449	7,973,625	9,337,324	16,291,870	6,861,930	7,808,167	13,362,384	8,856,916	8,858,254	118,012,169
Maryland	19,773,368	23,020,377	40,143,312	23,856,607	25,263,827	44,283,699	24,988,816	24,006,106	43,935,367	24,712,208	26,604,089	26,740,908	343,328,786
Massachusetts	31,492,433	23,748,484	23,341,274	26,527,566	20,240,866	26,863,277	19,482,481	20,642,680	27,377,747	24,762,958	20,379,329	25,580,332	271,639,431
Michigan	51,007,392	46,956,142	60,263,082	53,966,389	54,392,096	68,776,082	53,248,367	60,794,937	64,399,533	75,557,866	60,417,523	70,927,340	720,675,386
Minnesota	23,816,015	29,913,978	29,968,263	29,370,104	29,822,996	33,436,080	29,921,620	30,686,128	28,238,451	33,151,694	33,323,791	34,997,274	374,862,530
Mississippi	31,042,289	22,886,608	38,755,510	30,836,158	28,714,087	39,609,406	33,492,040	26,890,912	28,683,772	38,044,032	27,164,819	30,992,432	340,034,065
Missouri	49,861,812	38,017,356	60,042,899	61,611,829	58,376,474	60,693,020	55,089,842	60,894,324	67,114,035	66,235,145	58,185,192	69,140,878	695,148,978
Montana	12,832,046	12,888,760	9,644,031	9,771,084	11,428,840	10,121,489	14,032,068	13,189,874	13,337,839	13,370,735	11,120,308	6,662,058	139,467,843
Nebraska	21,886,182	16,667,191	17,248,367	22,270,346	20,397,708	22,451,139	19,795,881	24,834,998	24,581,104	21,867,136	24,717,734	24,873,592	282,476,378
Nevada	9,742,253	13,597,828	12,916,077	9,820,834	16,084,086	13,772,300	10,062,813	10,864,407	21,341,008	10,923,673	9,972,423	27,643,098	176,799,980
New Hampshire	6,983,011	2,375,815	8,280,272	4,866,014	2,237,854	8,294,948	5,617,276	2,309,414	5,214,182	5,967,329	1,490,736	6,177,448	59,913,176
New Jersey	36,390,585	41,494,856	40,871,229	41,367,571	42,464,191	6,657,171	38,633,339	49,076,636	37,048,806	40,780,989	49,703,621	36,090,961	440,571,339
New Mexico	81,708,371	6,164,351	1,740,062	34,422,966	11,871,351	623,398	48,866,073	782,037	28,967,571	18,119,867	1,208,491	43,956,730	241,403,268
New York	60,881,752	62,789,769	68,780,088	69,079,730	77,476,436	78,856,897	74,149,037	77,215,974	77,781,286	76,365,947	72,418,115	66,416,291	862,210,995
North Carolina	36,533,878	68,064,088	62,848,890	48,023,126	96,307,498	64,383,489	84,845,408	94,364,273	78,198,378	48,643,180	62,889,132	99,472,884	846,329,771
North Dakota	8,197,118	10,481,139	8,234,362	9,253,064	9,864,942	8,380,988	7,371,273	10,984,842	11,166,222	11,400,364	11,294,289	9,767,318	111,545,886
Ohio	82,249,019	78,244,686	92,456,376	92,613,998	61,798,214	92,447,387	91,341,302	71,367,995	93,866,123	94,967,882	71,837,186	88,273,499	1,011,363,671
Oklahoma	38,453,024	32,689,835	36,586,309	36,668,911	37,216,216	33,492,141	37,106,938	36,164,764	39,348,681	37,561,879	34,845,979	41,012,949	432,999,479
Oregon	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,602	29,089,594	349,075,930
Pennsylvania	77,302,435	76,901,139	92,886,767	84,329,992	84,373,256	119,319,264	84,417,869	87,800,779	104,429,167	91,620,091	87,443,240	101,698,917	1,092,452,896
Rhode Island	2,796,608	2,796,608	2,796,608	3,630,480	3,630,480	3,630,480	2,640,801	2,640,801	2,640,801	3,709,840	3,709,840	3,709,840	38,384,173
South Carolina	31,473,284	38,441,460	38,967,399	39,085,558	32,074,112	42,709,666	27,388,885	31,961,188	42,552,160	38,099,345	31,872,532	39,304,191	410,034,664
South Dakota	8,764,731	8,534,860	9,340,434	8,320,511	6,672,990	8,448,945	9,461,744	10,061,528	10,997,309	11,451,187	11,009,183	10,121,154	114,826,576
Tennessee	80,804,799	62,309,114	86,291,676	63,301,869	82,149,825	82,876,779	88,804,112	95,894,460	84,482,899	47,211,868	88,479,633	646,225,868	1,048,233,688
Texas	116,991,201	119,882,422	144,717,195	127,421,020	128,300,912	149,111,143	138,184,361	160,862,616	153,072,260	149,636,144	150,148,376	162,906,849	1,700,211,779
Utah	23,827,079	12,009,579	5,677,468	21,501,468	11,806,884	16,899,695	26,866,169	13,699,995	10,066,532	24,393,489	15,414,100	10,673,632	191,296,824
Vermont	4,486,201	12,390,385	854,494	3,875,395	7,821,175	8,492,739	2,086,390	6,963,009	8,283,775	2,813,815	6,396,806	7,611,899	70,576,362
Virginia	45,886,935	46,642,468	67,842,943	54,664,391	48,788,453	63,507,023	54,257,480	52,910,095	54,882,148	58,667,073	52,221,711	54,475,806	629,573,217
Washington	12,272,199	49,180,248	19,284,829	38,629,466	34,525,866	22,232,074	37,322,714	33,021,124	38,836,456	30,826,983	34,804,984	18,849,383	389,796,121
West Virginia	13,187,667	20,527,691	13,234,673	26,208,747	13,638,787	17,004,849	21,714,098	15,233,670	17,921,128	29,746,198	18,425,636	6,779,829	213,604,039
Wisconsin	39,583,149	38,933,342	43,861,805	48,422,940	42,664,310	44,239,389	43,475,898	44,773,672	47,778,663	47,423,094	48,160,540	48,332,617	533,651,428
Wyoming	14,882,818	16,711,077	7,206,491	13,766,940	15,620,786	11,822,666	19,481,069	16,785,188	20,867,433	22,331,397	20,671,636	19,228,840	209,804,980
U.S. Total	1,482,028,694	1,426,548,499	2,077,381,211	1,962,776,062	1,781,486,804	2,164,013,398	1,978,094,427	1,872,726,142	2,208,313,190	2,002,191,772	1,916,264,422	2,185,462,136	23,615,251,918
Puerto Rico	3,344,180	2,627,883	3,964,178	5,481,200	5,615,878	6,180,178	10,836,455	6,876,679	10,452,715	12,264,180	12,236,128	10,890,736	101,691,832
Grand Total	1,485,372,874	1,429,176,382	2,081,301,396	1,972,264,362	1,787,102,679	2,170,193,576	1,988,930,882	1,879,602,821	2,218,765,905	2,014,456,952	1,928,490,550	2,196,352,864	23,717,073,715

1 This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State, and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year-end analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels at the wholesale level. In some cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels by month is reported in table MF-25 in the annual report, Highway Statistics.

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1994[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL TAX REPORTS

(GALLONS)

TABLE MF-3.35F
MARCH 1996

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	60,826,807	41,611,434	56,491,311	72,523,884	46,615,872	45,615,872	61,394,231	46,349,177	53,598,191	65,734,447	53,533,295	64,730,256	669,024,777
Alaska	2,086,027	2,035,185	2,318,081	2,506,691	2,810,901	2,959,511	3,133,363	3,078,606	2,683,133	2,512,775	2,129,480	2,117,302	30,421,006
Arizona	37,480,498	31,584,674	46,721,000	39,981,273	33,519,148	35,187,699	39,992,780	47,842,883	34,077,210	38,920,831	34,002,590	43,769,732	463,479,747
Arkansas	16,482,192	58,747,175	28,733,400	41,838,319	42,266,847	44,850,286	40,033,007	38,949,646	34,374,036	45,356,029	32,278,169	41,284,814	472,196,920
California	127,989,000	138,394,000	154,933,000	166,641,000	162,691,000	182,660,000	190,280,000	177,831,000	160,389,000	188,185,000	201,031,000	191,535,000	2,038,629,000
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	12,010,951	11,634,468	21,535,153	14,904,080	18,663,200	23,796,468	15,770,327	11,197,355	13,906,099	15,483,532	14,734,742	15,680,937	186,427,392
Delaware	4,207,884	8,069,777	2,648,947	6,908,848	6,732,308	4,645,347	3,726,897	7,295,791	4,567,161	3,710,855	7,699,710	4,308,121	62,278,346
Dist. of Col.	1,761,513	1,664,389	1,796,768	1,839,906	1,764,169	2,053,631	1,947,295	1,954,074	1,769,789	1,773,127	1,755,705	1,809,677	21,889,129
Florida	81,914,378	82,368,808	75,761,507	93,671,837	73,305,461	89,935,794	68,631,335	77,880,688	80,010,349	76,079,966	82,126,057	81,546,944	963,393,123
Georgia	79,986,910	64,865,749	83,586,945	98,328,675	88,723,217	87,522,647	85,674,702	92,254,800	84,805,679	92,107,592	83,563,404	68,852,517	1,090,161,533
Hawaii	2,471,008	2,372,293	2,379,595	2,986,393	3,811,792	1,609,168	3,447,261	1,527,872	3,219,267	3,166,586	1,122,379	3,612,104	31,761,247
Idaho	14,194,190	10,201,281	12,915,524	12,610,152	13,637,536	13,673,204	12,000,043	13,629,847	14,684,209	16,173,009	14,084,619	12,754,719	160,362,335
Illinois	86,802,401	68,847,713	112,422,400	67,746,008	67,366,275	106,683,090	86,816,200	41,024,960	134,082,209	62,869,328	61,424,739	100,212,117	916,486,519
Indiana	73,080,304	72,462,163	90,176,626	77,786,943	77,861,817	83,009,915	77,080,163	63,091,114	83,457,363	74,174,463	82,402,758	82,535,150	937,708,409
Iowa	27,026,201	26,413,291	34,629,773	29,012,824	28,837,679	38,173,230	28,033,623	31,669,420	38,382,178	31,839,169	31,342,081	35,495,691	380,975,163
Kansas	8,698,765	34,340,488	25,813,018	30,729,248	26,534,581	22,260,400	27,290,814	28,830,662	30,382,772	27,570,765	25,773,579	24,483,201	300,388,081
Kentucky	17,918,220	82,298,404	27,989,582	39,735,985	47,862,273	71,178,725	80,189,956	48,881,888	64,125,013	80,153,867	63,707,445	36,844,353	690,579,681
Louisiana	38,834,629	29,781,770	33,495,736	37,836,868	41,469,601	36,134,721	43,285,086	37,493,422	40,996,600	39,764,280	33,304,517	34,370,428	446,747,727
Maine	13,004,843	9,666,022	6,951,311	14,096,012	6,161,285	6,815,021	16,267,880	13,456,086	8,801,393	11,892,498	12,169,806	9,567,977	129,519,804
Maryland	30,101,660	20,827,827	26,680,683	23,997,316	27,870,810	27,981,707	22,332,761	30,561,386	26,636,038	29,261,984	26,470,332	29,207,395	310,949,799
Massachusetts	21,286,901	14,386,107	24,996,897	47,192,330	27,800,881	25,038,861	26,232,728	23,413,705	25,264,385	28,109,036	21,537,066	30,826,164	297,748,440
Michigan	57,872,982	59,182,818	58,676,714	52,240,350	64,277,120	64,257,866	58,570,723	61,447,849	61,344,359	68,686,663	68,211,186	68,904,163	731,527,884
Minnesota	27,977,430	30,787,973	35,423,561	30,670,103	33,619,982	36,816,620	32,439,822	36,098,988	40,643,728	39,467,923	38,433,840	39,836,381	422,126,043
Mississippi	35,703,261	27,449,719	28,606,452	31,630,705	26,667,121	29,873,673	28,815,946	31,562,331	31,536,768	31,600,249	30,269,697	28,401,876	362,184,888
Missouri	66,349,266	46,176,488	70,061,657	61,180,338	58,708,506	73,013,616	47,370,951	62,845,735	60,207,707	60,247,884	58,047,716	72,542,900	736,702,783
Montana	13,437,928	10,690,890	13,054,727	11,898,827	13,898,988	14,613,148	12,848,809	12,944,894	12,672,803	15,199,016	13,003,002	12,740,603	156,703,335
Nebraska	23,289,231	16,677,160	23,289,536	24,368,409	21,492,415	23,444,188	23,362,163	23,173,963	23,866,488	24,720,089	26,358,221	24,791,744	286,823,570
Nevada	9,486,305	9,020,815	31,145,241	11,008,926	11,702,176	18,854,486	11,696,765	12,892,238	15,866,973	12,562,363	13,139,161	17,689,842	174,734,283
New Hampshire	6,319,228	7,825,277	4,747,116	5,438,109	4,042,878	4,268,465	6,441,314	1,995,872	6,206,307	7,691,869	2,856,676	3,730,605	66,863,616
New Jersey	47,017,280	36,160,130	34,761,974	45,280,347	44,757,672	51,929,820	39,698,090	48,258,948	47,611,362	29,715,680	73,397,323	63,283,140	561,866,816
New Mexico	41,015,317	15,103,988	1,081,114	16,960,628	38,345,187	[illegible]	43,666,781	11,542,466	447,787	49,391,306	7,040,727	726,201	226,138,440
New York	90,088,851	76,101,909	62,979,663	61,346,017	76,918,152	84,410,989	75,699,829	97,715,869	82,768,987	75,847,024	63,604,957	80,986,488	917,304,333
North Carolina	38,296,541	88,272,752	66,883,021	56,342,817	62,157,233	71,935,435	86,326,756	66,853,879	69,323,486	60,280,633	52,359,306	83,980,132	772,021,991
North Dakota	7,424,690	11,676,273	10,304,713	7,524,838	11,330,278	10,491,049	12,821,765	13,369,503	11,732,351	11,400,364	12,151,703	10,331,197	131,478,724
Ohio	84,711,666	66,587,999	109,300,009	96,265,139	87,844,938	99,753,798	92,831,812	93,039,021	108,685,388	96,101,780	81,175,415	99,041,678	1,116,338,032
Oklahoma	31,577,723	39,222,009	41,546,827	40,694,216	39,395,109	41,143,551	41,296,766	41,803,717	36,712,079	40,743,096	41,409,630	42,763,878	478,308,541
Oregon	28,376,722	28,376,722	28,376,722	28,376,722	28,376,722	28,376,722	28,376,725	28,376,722	28,376,722	28,376,722	28,376,722	28,376,722	340,520,667
Pennsylvania	80,037,430	80,103,790	103,477,763	85,748,829	93,663,170	112,647,980	87,816,046	97,488,292	114,770,149	97,627,586	93,229,422	112,204,999	1,155,819,486
Rhode Island	3,160,566	3,160,566	3,160,568	3,694,648	3,694,648	3,694,649	3,749,784	3,749,786	3,749,786	3,456,088	3,456,088	3,456,090	42,182,986
South Carolina	34,576,629	28,253,861	78,468,913	45,695,171	46,024,977	49,441,062	52,216,615	35,809,851	38,497,928	63,590,306	53,671,297	41,300,810	624,995,419
South Dakota	10,066,314	10,067,373	11,078,441	11,011,478	11,087,572	10,758,732	10,803,417	12,863,056	12,261,186	13,248,947	12,858,208	11,293,783	137,397,475
Tennessee	56,341,903	53,282,481	51,086,124	46,940,457	51,313,381	62,688,747	55,489,817	62,382,210	58,533,974	62,375,782	57,041,042	61,093,726	678,472,542
Texas	150,680,940	146,984,299	172,928,561	177,265,489	162,284,281	180,826,996	152,637,763	171,025,282	172,757,614	159,362,068	167,523,784	160,164,213	1,964,401,590
Utah	21,453,715	9,701,353	16,305,340	20,366,465	15,578,526	20,286,867	24,293,982	18,665,674	19,008,976	20,043,397	7,939,787	17,928,958	211,573,192
Vermont	3,298,670	11,928,508	4,162,077	4,332,478	4,332,478	11,283,054	1,370,689	9,670,057	3,856,715	4,482,801	10,775,183	4,470,341	73,961,048
Virginia	49,893,337	48,120,313	65,276,180	54,090,075	56,013,699	70,213,576	61,678,195	60,050,414	60,249,576	57,465,541	52,465,228	86,640,369	682,156,412
Washington	29,060,864	32,951,162	24,668,675	27,862,312	26,360,803	34,434,693	27,538,266	26,663,980	24,209,328	28,286,524	20,393,723	62,809,354	465,279,684
West Virginia	1,647,708	35,188,669	13,826,599	15,598,405	29,821,615	19,342,439	26,984,783	20,498,843	16,356,733	804,405	19,563,408	13,253,388	212,587,375
Wisconsin	42,566,367	43,963,011	31,063,584	41,144,532	56,956,240	63,899,443	51,564,605	52,295,815	55,031,292	40,411,905	41,483,175	46,269,392	566,648,361
Wyoming	13,543,837	11,201,978	18,407,522	12,684,680	15,871,197	17,751,586	16,648,766	12,304,049	23,541,798	19,178,082	22,715,468	14,971,672	198,820,529
U.S. Total	1,810,193,692	1,926,511,126	2,084,465,037	2,071,444,426	2,080,948,579	2,280,375,564	2,038,534,775	2,133,529,561	2,219,623,621	2,179,360,781	2,071,995,472	2,203,872,311	25,098,844,966
Puerto Rico	8,868,575	6,030,675	8,524,900	8,717,900	10,406,123	10,923,300	11,651,150	6,956,940	9,108,080	10,316,725	10,398,480	9,221,600	111,121,248
Grand Total	1,819,062,267	1,930,541,801	2,092,989,137	2,080,162,326	2,091,354,702	2,291,298,864	2,050,185,925	2,140,486,501	2,228,731,671	2,189,677,506	2,082,393,952	2,213,093,911	25,209,966,203

[1] This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year-end analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels at the wholesale level. In some cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels is reported in table MF-21 in the annual report *Highway Statistics*.

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1995[1]

COMPILED FOR THE CALENDAR YEAR FROM STATE FUEL-TAX REPORTS

(GALLONS)

REVISED

TABLE MF-339
OCTOBER 1997

STATE	JANUARY (S) STATED	FEBRUARY (S) STATED	MARCH (S) STATED	APRIL (S) STATED	MAY (S) STATED	JUNE (S) STATED	JULY (S) STATED	AUGUST (S) STATED	SEPTEMBER (S) STATED	OCTOBER (S) STATED	NOVEMBER (S) STATED	DECEMBER (S) STATED	TOTAL 2/
Alabama	86,321,730	98,884,008	83,184,187	77,163,423	69,184,035	61,220,913	67,176,883	83,084,809	84,736,436	71,864,726	68,267,794	84,884,304	886,436,788
Alaska	(12,686,137)	12,464,337	16,086,865	9,738,868	(2,349,954)	3,804,682	6,903,274	12,827,803	10,607,774	6,486,830	2,831,474	9,617,639	66,996,858
Arizona	61,119,404	67,516,298	85,377,743	82,575,566	37,796,350	82,723,527	64,342,753	66,867,435	69,103,076	65,167,336	(20,675,317)	68,480,926	678,391,611
Arkansas	17,826,660	66,772,381	77,420,986	38,160,289	69,740,137	38,782,546	62,398,183	39,849,407	32,741,978	64,342,234	39,957,938	62,649,330	490,813,741
California	149,161,771	144,856,771	142,856,771	116,571,771	123,161,771	108,161,771	115,856,771	115,856,771	115,856,771	115,856,771	115,856,771	115,856,771	[illegible]
Colorado	19,846,753	23,166,811	23,216,180	16,783,246	28,846,480	25,989,668	22,674,644	26,867,399	26,141,147	24,980,647	26,014,628	24,601,842	288,784,825
Connecticut	13,819,908	11,945,629	20,912,616	13,721,225	13,503,834	24,181,217	14,730,926	17,717,264	14,278,944	15,881,608	16,845,481	23,308,089	200,736,547
Delaware	6,885,086	7,017,868	2,945,880	5,564,731	2,366,943	5,793,906	7,733,072	3,789,752	4,080,686	7,812,687	8,778,998	4,292,867	66,381,648
Dist. of Col.	1,738,700	1,629,765	1,839,887	1,736,908	1,783,521	1,912,330	1,816,471	2,026,893	1,790,800	1,761,715	1,762,765	1,636,978	21,362,733
Florida	81,829,096	81,426,835	83,460,827	90,773,040	82,280,918	99,923,861	73,738,569	74,966,184	71,986,939	84,082,040	83,626,433	104,196,897	1,088,822,789
Georgia	93,384,113	93,932,040	101,615,757	86,068,817	109,156,048	92,714,714	91,066,868	98,692,042	82,889,866	92,307,112	93,288,710	90,617,973	1,116,612,752
Hawaii	2,359,142	1,662,909	1,318,980	2,430,484	2,192,229	2,497,732	2,166,841	2,527,784	2,382,767	1,487,983	2,227,912	2,381,330	27,826,073
Idaho	16,843,188	13,906,709	14,116,648	11,121,881	13,638,890	12,226,679	15,763,271	12,637,438	13,450,304	14,906,614	12,317,230	16,822,343	167,369,581
Illinois	63,610,244	62,221,417	132,398,686	74,063,384	74,393,379	136,279,937	70,217,181	78,603,695	143,829,868	82,085,135	76,024,460	131,046,035	1,124,869,380
Indiana	72,343,707	60,793,480	70,035,340	81,081,636	88,056,372	79,422,726	77,828,871	70,737,777	84,896,800	76,338,847	76,282,221	92,826,999	870,031,745
Iowa	39,836,741	37,936,166	36,341,963	39,618,969	32,099,629	38,518,446	31,431,871	33,667,432	39,666,230	36,427,989	33,000,221	40,783,337	413,884,674
Kansas	77,156,987	57,830,644	73,084,647	56,481,826	56,052,754	52,366,176	56,061,264	56,254,972	58,711,384	52,108,706	56,067,713	56,077,812	704,863,136
Kentucky	32,761,689	32,308,758	63,383,644	93,969,168	27,922,566	66,412,476	46,443,095	51,482,511	51,480,511	63,672,005	89,578,540	66,037,514	682,113,745
Louisiana	39,430,740	37,408,622	43,986,019	39,872,788	42,866,112	38,664,985	42,754,960	39,443,669	43,368,262	39,849,771	35,588,772	41,640,696	484,936,366
Maine	16,392,917	9,692,629	6,099,172	13,932,282	10,271,361	7,980,630	13,497,734	9,977,432	9,574,663	11,707,869	7,863,223	10,191,845	130,731,867
Maryland	21,795,886	24,868,133	30,457,556	29,248,745	26,112,844	30,506,699	24,485,718	32,112,050	27,274,361	31,188,851	23,542,635	27,029,968	329,019,575
Massachusetts	17,830,822	23,813,468	17,338,415	38,478,924	30,866,832	25,496,117	28,776,284	23,644,188	27,821,083	27,231,771	27,794,839	24,230,988	316,999,363
Michigan	57,777,166	61,947,845	84,216,290	60,940,276	67,798,314	67,481,808	54,031,578	72,634,964	59,767,214	71,511,729	59,097,373	88,473,916	745,667,488
Minnesota	32,736,183	28,920,644	31,236,830	33,186,979	46,597,897	36,381,364	36,234,922	36,711,384	44,820,140	43,006,742	43,006,742	41,897,821	434,927,848
Mississippi	30,661,474	27,697,480	31,426,309	31,689,198	31,162,772	31,954,273	31,514,873	28,875,097	30,748,969	37,186,339	26,266,618	36,566,020	378,787,898
Missouri	54,546,188	49,948,157	71,698,018	62,457,828	47,259,869	71,989,831	56,298,323	73,208,994	66,408,843	68,981,887	68,126,633	63,490,897	743,439,518
Montana	12,040,668	10,828,237	12,998,334	12,230,847	12,990,336	13,338,947	14,614,878	14,836,466	16,938,613	15,739,032	11,967,561	12,480,786	169,631,704
Nebraska	26,818,200	22,084,725	26,190,248	25,983,960	23,906,790	29,976,277	23,032,198	27,873,106	27,734,551	27,810,592	29,775,881	25,889,982	314,484,000
Nevada	12,225,679	15,820,960	14,429,996	13,596,914	14,350,131	18,310,765	14,114,398	14,469,940	19,464,581	14,224,466	12,464,783	17,576,777	176,726,570
New Hampshire	8,089,338	3,326,261	5,452,899	6,188,839	3,059,798	4,115,168	6,869,723	6,970,890	8,679,980	7,111,834	2,181,783	5,867,311	63,988,944
New Jersey	89,585,137	64,719,464	88,192,488	86,638,074	86,488,074	92,861,264	85,251,264	86,120,536	86,120,536	86,120,536	86,269,787	43,979,711	1,011,956,971
New Mexico	32,334,817	31,670,334	20,366,683	30,063,898	26,174,934	22,408,814	23,082,884	27,666,271	30,061,648	28,948,321	26,388,608	24,457,572	323,206,484
New York	68,818,668	70,814,618	84,751,248	71,431,744	86,770,868	85,643,830	76,762,186	86,621,898	79,293,414	80,407,619	71,193,748	62,839,065	921,830,280
North Carolina	61,908,190	67,576,976	45,586,681	90,272,262	60,409,712	70,043,099	61,284,662	63,988,717	79,458,868	63,995,084	57,908,861	78,108,179	780,523,410
North Dakota	7,976,973	9,084,086	6,992,612	9,990,480	12,284,691	13,088,308	9,089,222	13,790,909	12,822,868	14,097,684	13,152,378	10,989,168	134,266,886
Ohio	94,884,898	77,932,882	98,440,845	95,122,673	106,420,604	96,871,929	97,812,967	105,721,160	110,641,119	116,243,929	109,061,986	94,761,726	1,203,535,726
Oklahoma	38,243,719	40,988,364	44,118,577	42,167,248	41,359,486	43,812,454	40,067,541	43,421,648	42,787,093	42,767,136	43,519,266	38,904,854	497,865,524
Oregon 3/	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	30,984,236	371,810,832
Pennsylvania	90,714,868	86,330,835	112,434,877	92,364,887	97,388,388	116,836,340	89,970,093	108,271,568	116,238,608	94,781,316	108,990,140	1,204,713,644
Rhode Island	3,308,966	2,308,966	3,308,967	3,726,109	3,726,109	3,726,110	2,929,278	3,929,278	3,929,278	4,298,166	4,298,166	4,298,167	44,471,360
South Carolina	38,030,964	30,951,037	48,894,960	44,887,485	33,887,340	42,666,987	36,983,867	36,492,747	42,974,432	42,118,866	33,881,139	38,999,339	463,669,080
South Dakota	10,669,117	10,140,885	11,821,257	10,082,674	10,784,785	11,426,163	11,344,717	12,867,948	11,937,894	13,438,278	12,636,720	11,074,028	137,863,366
Tennessee	52,867,806	59,864,549	61,796,161	62,038,070	61,616,649	63,661,275	59,107,938	64,802,304	59,489,514	66,238,982	61,921,103	56,469,706	730,080,757
Texas	183,271,891	164,809,086	179,584,090	164,470,644	167,722,348	185,287,612	164,599,925	180,077,564	170,788,086	178,817,166	176,383,906	169,574,337	2,085,040,377
Utah	23,618,038	26,791,618	26,597,830	18,163,792	22,871,759	26,367,311	16,797,484	16,066,468	20,552,378	17,973,716	18,924,298	22,963,350	260,888,361
Vermont	5,066,948	4,880,219	9,998,888	3,220,568	6,411,129	725,073	7,397,803	2,097,882	3,436,798	3,046,813	3,436,894	63,899,160
Virginia	87,868,416	92,889,766	89,638,846	84,006,098	90,725,813	74,489,642	43,952,926	68,825,658	84,834,898	81,863,193	98,489,383	84,960,498	980,948,090
Washington	39,888,231	41,948,309	37,586,409	43,264,803	44,884,805	39,676,883	38,858,040	36,693,660	42,861,481	36,866,404	40,533,385	44,748,418	486,779,476
West Virginia	11,583,899	35,043,480	13,297,348	18,760,639	28,143,799	7,147,841	26,089,374	21,302,749	17,050,348	24,921,963	12,020,660	12,836,487	232,007,408
Wisconsin	47,028,821	41,916,980	48,214,933	54,291,084	51,361,291	51,871,938	44,686,818	52,306,347	49,900,938	51,117,806	50,089,730	47,840,469	590,913,516
Wyoming	20,440,762	18,460,774	8,840,337	14,103,172	22,708,908	14,259,430	16,904,695	24,222,670	11,427,417	28,678,171	23,080,098	16,399,967	214,887,373
U.S. Total 2/	1,897,884,937	1,991,087,441	2,218,277,890	2,140,720,469	2,111,477,079	2,283,712,970	2,181,332,267	2,387,708,633	2,348,494,267	2,348,081,996	2,109,801,217	2,263,086,751	26,382,575,417
Puerto Rico	12,084,280	14,867,296	12,730,700	11,966,090	40,084,290	12,118,580	13,018,400	9,644,700	10,948,100	10,407,475	12,921,011	9,177,380	171,089,282
Grand Total 2/	1,909,409,187	2,005,954,737	2,231,017,280	2,177,686,619	2,151,530,329	2,295,831,550	2,192,541,867	2,397,377,383	2,358,438,551	2,358,489,471	2,122,722,228	2,272,263,931	26,473,614,699

1/ This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State, and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year-end analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels at the whole sale level. In some cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels is reported in table MF-21 in the annual report, Highway Statistics.

2/ Total includes only those States for which data are shown.

3/ Federal Highway Administration estimate.

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1996[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL TAX REPORTS

(GALLONS)

TABLE MF-33S
MARCH 1998

STATE	JANUARY (51 STATES)	FEBRUARY (51 STATES)	MARCH (51 STATES)	APRIL (51 STATES)	MAY (51 STATES)	JUNE (51 STATES)	JULY (51 STATES)	AUGUST (51 STATES)	SEPTEMBER (51 STATES)	OCTOBER (51 STATES)	NOVEMBER (51 STATES)	DECEMBER (51 STATES)	TOTAL 2/
Alabama	76,363,781	44,661,473	46,223,438	48,116,233	50,206,341	64,712,682	43,084,075	61,798,340	38,437,210	52,419,709	44,374,574	63,798,474	600,666,526
Alaska	4,111,402	4,420,586	4,033,284	11,182,531	5,612,845	2,326,318	6,986,769	13,367,705	1,191,438	4,236,189	3,168,388	67,937,952	
Arizona	42,567,754	40,793,923	44,691,300	52,371,421	48,716,490	46,692,718	49,204,861	32,796,660	39,532,421	39,093,842	46,568,575	46,679,706	529,309,117
Arkansas	27,633,446	47,514,980	36,915,761	49,304,721	37,631,690	38,010,982	36,663,860	29,004,272	65,351,344	22,253,549	61,268,476	46,067,465	497,689,636
California	158,861,000	161,100,000	173,507,000	141,349,000	203,796,000	189,121,000	190,089,000	183,399,000	203,605,000	233,266,000	137,067,000	157,842,000	2,113,802,000
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	15,280,506	13,359,280	23,342,583	11,322,867	15,371,192	25,560,206	16,621,066	16,490,897	26,456,684	18,539,993	15,712,474	24,651,862	222,698,300
Delaware	7,610,073	3,502,700	2,945,580	8,807,005	3,481,564	4,347,354	6,926,236	3,917,396	4,683,889	5,254,244	4,416,285	3,973,511	59,866,817
Dist. of Col.	1,685,395	1,729,560	1,821,264	1,804,820	1,719,834	1,800,075	1,714,427	1,921,665	1,729,560	1,826,436	1,592,901	1,746,580	21,092,497
Florida	82,071,083	90,767,784	74,569,108	72,227,167	87,000,017	77,735,814	82,436,568	95,345,902	95,540,262	85,425,912	100,567,674	98,474,361	1,038,761,540
Georgia	92,384,694	90,902,728	92,118,185	97,127,456	103,211,582	99,259,098	106,326,723	107,078,048	86,189,346	111,983,670	86,153,151	109,970,311	1,182,784,792
Hawaii	2,544,845	1,317,125	3,362,049	2,449,779	1,616,857	2,617,287	2,397,420	4,117,450	2,352,214	1,898,757	2,725,197	3,845,089	30,841,189
Idaho	16,763,481	11,330,524	15,687,966	13,618,766	11,117,495	12,310,571	16,589,265	10,891,519	29,664,375	16,795,061	9,423,587	28,835,311	199,018,541
Illinois	73,153,227	69,905,923	124,056,968	77,778,748	71,711,228	138,173,770	76,928,269	74,805,749	143,582,490	88,843,190	73,670,748	127,173,976	1,139,666,268
Indiana	68,213,070	77,179,244	68,047,868	82,886,991	80,662,196	86,183,302	76,767,516	62,521,394	85,516,400	82,323,468	89,001,239	82,304,700	941,607,068
Iowa	37,826,138	32,564,859	37,731,718	38,533,978	37,625,898	35,056,338	34,997,492	36,372,100	38,373,402	42,250,028	38,983,615	33,314,900	442,560,816
Kansas	34,476,274	26,564,582	23,782,918	32,778,102	32,188,325	38,033,527	31,361,417	32,368,580	32,901,871	36,089,710	31,043,486	29,353,998	356,549,811
Kentucky	58,920,818	32,766,037	53,112,647	42,661,091	42,662,991	69,842,081	43,041,340	12,158,019	64,860,923	62,317,535	48,392,259	62,838,904	569,537,368
Louisiana	39,297,558	46,559,496	46,439,990	54,134,412	41,544,932	39,535,363	41,154,695	38,673,967	40,636,930	41,064,626	31,857,456	80,739,010	611,637,436
Maine	13,043,589	6,934,785	10,529,916	12,651,200	6,400,547	8,848,967	14,879,089	9,616,138	18,912,582	12,136,796	13,083,668	12,160,140	136,197,384
Maryland	34,612,326	26,206,887	27,081,818	32,937,403	31,351,887	33,271,168	33,051,192	30,101,785	30,708,808	34,221,407	30,951,919	29,268,936	367,664,668
Massachusetts	16,256,300	24,017,766	18,133,398	22,276,820	45,650,792	20,437,491	21,936,897	17,241,678	36,926,821	34,202,791	21,891,846	36,820,004	315,791,389
Michigan	86,674,712	66,411,986	83,122,970	64,710,769	70,423,837	62,835,620	84,890,979	71,342,979	66,776,151	74,872,708	64,586,866	64,586,868	778,436,418
Minnesota	36,739,960	33,008,109	38,381,267	33,748,773	38,901,123	41,241,776	39,260,351	39,082,983	47,719,326	46,999,238	39,992,898	41,616,004	485,188,329
Mississippi	31,676,006	27,826,713	29,648,536	37,724,760	32,368,295	47,887,960	34,913,211	34,910,550	35,585,573	38,488,164	28,998,630	34,892,720	403,727,377
Missouri	62,201,754	60,713,925	61,707,204	62,586,758	57,418,225	60,993,911	61,254,432	69,638,990	61,619,511	74,166,161	68,305,694	71,642,815	772,248,380
Montana	13,090,480	8,358,354	13,460,128	12,859,870	11,619,288	16,279,326	11,991,510	14,353,293	16,268,945	14,350,489	11,663,759	10,360,102	154,686,534
Nebraska	28,668,981	25,661,813	29,725,744	28,569,715	24,898,083	25,003,971	29,000,573	29,100,040	29,087,282	31,454,231	29,614,796	27,634,230	338,898,689
Nevada	16,581,531	18,230,077	19,972,400	20,886,483	23,357,126	15,798,486	17,782,763	21,972,966	12,839,263	23,173,740	16,991,735	13,598,811	230,132,163
New Hampshire	7,217,280	3,266,589	8,636,302	5,740,457	3,087,646	8,438,086	5,723,476	5,731,561	4,969,129	5,781,267	2,934,655	5,930,283	61,334,641
New Jersey	43,609,268	49,883,909	47,446,675	53,177,160	62,933,371	62,143,681	65,744,765	62,328,879	65,302,539	69,515,882	46,928,108	51,561,663	620,618,003
New Mexico	30,594,081	24,750,438	29,378,339	26,862,219	23,410,341	23,519,991	24,243,763	22,077,866	36,723,616	16,294,893	37,170,880	23,085,883	317,110,270
New York	63,072,273	58,689,166	108,611,239	55,170,733	69,006,549	108,317,341	67,719,869	67,778,782	99,264,639	71,996,721	66,447,378	102,996,260	931,039,920
North Carolina	82,537,910	83,161,238	81,886,906	74,112,666	59,173,560	75,468,893	72,367,350	60,964,687	77,673,574	80,680,232	51,663,307	77,985,185	817,664,808
North Dakota	8,208,971	13,066,399	11,118,222	10,132,266	9,409,543	12,698,706	11,198,183	12,158,019	13,120,227	14,411,748	13,072,197	10,434,131	137,112,611
Ohio	102,408,769	97,425,780	103,662,601	104,760,691	112,370,994	91,192,061	108,733,296	102,490,369	104,163,286	116,271,671	99,886,110	106,714,613	1,245,199,781
Oklahoma	42,822,482	32,718,106	46,037,976	46,643,288	37,586,254	47,436,840	43,499,692	35,746,439	44,259,889	50,371,660	37,951,972	48,667,144	513,170,899
Oregon	32,392,653	32,390,653	32,390,653	32,390,653	32,390,653	32,390,653	32,944,765	32,390,679	35,302,539	33,390,653	32,390,653	32,390,653	388,647,836
Pennsylvania	92,609,766	92,366,379	94,853,145	98,199,617	103,952,747	93,977,282	100,722,619	106,558,810	89,741,356	110,782,230	100,831,013	85,688,934	1,169,283,807
Rhode Island	3,226,174	3,226,174	3,226,176	3,609,893	3,609,893	3,609,893	3,981,831	3,981,831	3,981,831	4,068,475	4,068,475	4,068,477	44,659,125
South Carolina	41,346,145	29,757,120	35,489,658	40,327,621	40,878,580	38,054,362	39,524,003	42,034,103	38,473,872	43,168,561	39,997,143	36,286,628	461,217,663
South Dakota	13,618,115	9,680,477	9,905,799	11,647,107	11,388,278	11,581,688	12,494,601	12,973,517	11,897,603	14,456,245	12,843,572	10,848,645	143,038,647
Tennessee	86,465,289	88,799,981	66,027,894	65,156,560	66,964,968	63,647,009	63,478,335	64,804,305	63,537,474	65,226,941	64,842,222	57,098,909	785,828,038
Texas	190,616,920	163,368,629	183,952,490	173,965,801	182,568,148	216,722,958	173,098,523	171,492,264	182,972,172	181,336,211	176,735,930	172,338,851	2,167,149,298
Utah	17,187,060	23,975,643	29,898,980	17,946,007	9,816,110	34,483,714	19,359,631	10,550,511	34,361,519	16,967,390	10,737,352	31,673,483	256,610,300
Vermont	10,462,744	8,783,614	8,483,179	7,635,179	6,740,858	12,448,888	2,992,398	9,753,700	10,042,923	8,990,570	10,042,923	8,990,570	106,107,900
Virginia	82,401,549	58,245,952	63,163,856	61,694,461	65,692,703	63,962,676	67,607,830	69,248,307	61,791,137	71,479,733	62,933,470	62,461,854	760,663,438
Washington	31,435,691	18,530,909	40,291,764	35,906,313	57,243,098	49,593,560	39,649,967	37,809,146	52,812,614	28,225,500	80,142,677	40,957,680	482,298,919
West Virginia	17,858,688	6,757,235	17,189,976	14,561,902	12,933,604	30,663,675	14,142,279	1,630,446	26,816,416	6,063,743	17,342,236	23,811,044	188,191,040
Wisconsin	49,626,996	44,836,198	48,106,740	46,455,689	54,374,339	40,471,962	52,058,577	48,732,946	49,863,803	56,791,778	53,804,856	44,798,506	589,489,386
Wyoming	20,854,720	16,433,786	12,785,809	14,469,211	22,326,152	14,009,781	23,372,448	20,660,276	20,194,156	25,713,987	24,483,660	20,023,377	239,167,327
U.S. Total 2/	2,128,992,618	1,992,287,062	2,266,170,263	2,197,518,664	2,280,356,440	2,416,210,426	2,248,074,973	2,181,617,807	2,482,756,631	2,384,548,047	2,204,636,619	2,429,278,280	27,211,647,219
Puerto Rico	14,970,725	14,641,700	9,642,392	13,212,750	14,340,000	21,962,250	16,050,600	18,052,035	13,907,074	19,712,373	16,568,460	14,256,950	167,306,309
Grand Total 2/	2,143,963,343	2,006,928,762	2,274,813,155	2,210,731,404	2,294,696,440	2,438,172,676	2,264,125,623	2,199,669,842	2,496,663,705	2,404,260,370	2,221,205,079	2,443,534,230	27,378,953,528

1/ This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State, and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year-end analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels at the whole sale level. In come cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels is reported in table MF-21 in the annual report, Highway Statistics.

2/ Total includes only those States for which data are shown.

MONTHLY SPECIAL FUEL REPORTED BY STATES - 1997[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL TAX REPORTS

TABLE MF 33S
APRIL 1998

(GALLONS)

STATE	JANUARY (20 STATES)	FEBRUARY (20 STATES)	MARCH (20 STATES)	APRIL (20 STATES)	MAY (20 STATES)	JUNE (20 STATES)	JULY (20 STATES)	AUGUST (48 STATES)	SEPTEMBER (47 STATES)	OCTOBER (44 STATES)	NOVEMBER (41 STATES)	DECEMBER (26 STATES)	TOTAL 2/
Alabama	39,662,610	40,710,191	46,914,145	49,093,954	52,856,679	48,327,991	46,283,437	74,663,902	49,149,913	53,315,975	48,537,785	46,984,925	596,866,304
Alaska	3,318,248	815,287	3,939,886	4,269,089	3,900,696	5,001,810	14,963,108	-	-	-	-	-	36,098,082
Arizona	63,345,879	63,670,749	54,389,286	60,436,748	57,305,320	71,784,642	68,432,482	85,318,996	68,080,980	57,334,633	59,980,808	-	639,686,983
Arkansas	47,429,086	40,281,147	37,096,021	52,096,092	40,489,908	40,240,966	50,611,992	38,731,799	52,771,967	12,886,906	83,984,494	38,413,389	594,712,830
California	180,792,000	198,904,000	199,467,000	187,480,000	218,739,000	206,717,000	205,801,000	205,801,000	205,801,000	205,801,000	205,801,000	205,801,000	2,460,312,000
Colorado	19,962,326	16,780,011	6,912,326	21,662,981	22,730,533	22,648,821	26,154,894	24,420,463	24,019,873	26,696,454	21,351,117	24,898,364	260,693,990
Connecticut	15,278,262	12,636,478	23,896,393	15,614,629	15,748,347	14,722,776	18,321,300	16,099,888	17,302,290	-	-	-	184,610,363
Delaware	4,997,401	5,242,527	4,561,571	5,195,587	5,732,162	4,784,702	4,836,824	6,278,080	5,861,709	6,438,198	5,838,397	-	64,529,783
Dist. of Col.	1,780,611	1,616,077	1,783,171	1,836,332	1,868,146	1,847,908	2,029,989	1,889,033	1,861,520	1,880,617	1,616,326	1,748,869	21,688,978
Florida	94,208,725	100,580,866	96,180,732	103,661,692	108,311,836	101,176,084	92,427,996	97,330,896	91,283,826	89,731,197	108,072,679	98,862,994	1,183,628,980
Georgia	96,117,126	73,078,718	102,010,791	99,253,799	92,397,617	97,427,360	102,940,661	91,440,111	73,831,256	123,918,138	107,812,018	-	1,060,398,775
Hawaii	1,903,737	2,564,373	1,969,498	2,631,706	2,924,114	2,002,869	2,091,689	2,681,092	2,643,149	2,627,880	2,361,687	2,329,260	28,794,960
Idaho	19,810,423	9,469,898	15,207,299	13,958,089	10,043,963	29,112,835	19,087,635	5,813,005	34,446,963	12,940,563	-	-	169,888,330
Illinois	78,345,866	67,877,365	71,584,197	81,716,699	77,924,643	74,786,922	73,739,798	76,198,736	79,830,710	90,418,758	86,087,777	84,845,715	961,737,386
Indiana	86,814,466	89,132,765	94,543,247	98,484,880	73,121,981	98,139,386	92,311,542	98,484,446	97,429,976	103,727,180	106,180,729	-	1,038,514,477
Iowa	39,136,726	38,961,197	30,896,082	42,751,932	41,163,981	32,045,606	42,083,052	42,598,864	32,846,447	49,977,701	30,231,216	-	442,793,437
Kansas	34,549,729	27,107,080	26,185,832	31,484,339	24,493,052	26,482,786	32,416,466	29,401,649	30,589,410	17,884,571	45,885,411	-	330,059,126
Kentucky	59,308,915	52,921,295	68,980,793	62,762,260	64,846,505	66,104,015	52,905,771	68,722,833	75,614,908	45,997,683	90,922,137	(31,727,817)	684,634,806
Louisiana	36,980,011	36,722,187	43,322,438	42,501,765	46,019,845	48,075,811	44,008,617	43,647,673	49,346,887	38,961,700	51,929,046	61,375,434	538,766,994
Maine	14,058,426	6,784,109	13,791,576	16,093,928	4,008,524	10,917,236	8,115,206	-	-	-	-	-	73,769,005
Maryland	28,677,107	27,475,495	30,852,599	32,412,983	32,833,018	31,643,646	32,110,664	30,179,017	31,263,880	34,046,330	30,083,829	31,443,814	372,967,884
Massachusetts	32,826,377	30,693,966	24,273,077	33,486,276	32,481,988	34,699,827	30,829,690	27,389,682	-	-	-	-	314,471,038
Michigan	61,187,855	56,275,826	54,778,092	69,401,820	73,609,203	74,921,407	66,804,708	69,268,929	68,668,929	82,986,044	69,064,014	64,886,398	811,924,227
Minnesota	37,837,080	32,916,044	38,714,683	38,676,794	41,439,842	48,730,409	44,862,239	39,820,804	52,184,894	52,346,528	36,971,481	46,309,370	510,611,728
Mississippi	29,172,172	33,293,108	32,958,644	122,133,716	161,444,086	33,273,317	142,048,316	34,034,631	41,443,629	28,848,653	30,769,084	-	690,639,311
Missouri	71,089,426	68,932,928	74,514,774	72,822,126	74,032,070	60,196,492	73,070,735	64,623,780	69,084,526	73,884,373	66,845,808	60,869,291	816,633,238
Montana	11,738,674	12,641,345	10,273,409	16,464,821	13,827,200	12,806,880	14,866,830	15,689,852	15,186,099	-	-	-	123,144,132
Nebraska	17,606,002	28,410,732	30,035,193	19,451,891	21,606,602	26,290,341	24,126,957	33,907,010	32,643,946	28,879,561	36,756,482	34,648,234	314,364,703
Nevada	16,388,018	16,313,376	16,826,757	20,162,667	22,351,329	13,390,084	21,479,971	21,626,604	13,983,169	23,384,968	19,884,091	17,414,799	232,186,308
New Hampshire	16,958,317	9,965,199	11,063,082	8,124,993	9,226,917	9,424,208	7,888,471	8,775,814	9,127,080	9,423,889	7,800,006	7,800,006	125,583,977
New Jersey	80,739,259	80,861,714	88,400,775	82,049,499	89,202,346	68,898,160	62,719,988	61,287,225	84,574,937	87,798,688	75,434,040	68,917,682	960,881,623
New Mexico	21,903,007	20,178,499	32,627,211	27,392,037	27,496,490	32,193,362	14,639,491	34,323,068	36,291,990	10,387,699	49,436,466	36,629,407	343,382,980
New York	54,221,699	54,337,578	52,734,572	59,593,874	66,482,998	68,086,597	68,899,583	66,882,824	69,980,923	76,001,571	-	-	640,780,216
North Carolina	74,866,705	69,590,051	76,733,789	84,084,338	63,861,230	78,164,902	79,203,211	84,962,804	80,633,374	83,482,698	80,668,826	77,616,472	858,827,219
North Dakota	9,953,834	10,476,058	9,747,934	10,399,163	14,304,605	12,749,803	13,098,033	13,428,456	14,496,205	10,061,166	13,606,899	10,962,640	146,759,648
Ohio	121,744,821	101,780,967	110,969,821	126,481,389	111,220,316	108,280,617	113,234,456	108,354,464	113,803,486	121,664,860	107,366,268	116,142,986	1,361,034,251
Oklahoma	51,927,462	48,188,422	49,278,670	53,758,912	45,327,880	50,455,709	47,873,179	53,992,930	58,082,342	48,782,261	54,917,127	-	542,853,175
Oregon	-	-	-	-	-	-	-	-	-	-	-	-	-
Pennsylvania	100,258,595	92,739,384	93,296,654	108,647,780	108,083,149	98,970,284	104,095,852	101,631,897	122,086,000	1,148,826,677	99,888,129	99,348,463	2,271,488,864
Rhode Island	3,074,949	3,074,949	3,074,950	3,247,176	3,247,174	3,247,174	3,964,937	33,637,306	3,964,937	-	-	-	60,533,482
South Carolina	41,649,347	36,490,936	42,088,647	42,631,088	42,883,449	39,964,017	31,132,757	41,638,972	41,682,638	44,383,347	39,834,009	41,740,780	467,416,867
South Dakota	93,161,378	9,681,268	10,800,068	12,527,384	10,966,809	11,537,383	12,488,086	12,420,077	13,000,174	14,961,479	12,572,082	10,598,498	141,647,376
Tennessee	64,240,384	58,238,890	62,646,307	66,777,815	67,494,776	64,267,747	64,908,168	64,941,874	64,379,053	62,096,200	73,983,867	64,366,435	778,065,980
Texas	179,286,050	173,996,480	178,669,172	188,021,427	186,217,297	217,781,624	192,731,861	188,932,930	196,178,061	199,422,932	167,888,749	182,997,379	2,252,044,096
Utah	18,262,617	6,032,208	32,032,164	21,281,180	19,864,766	21,606,240	20,680,992	20,426,694	34,413,760	31,071,803	30,662,356	29,682,151	316,006,931
Vermont	8,989,617	12,815,181	8,458,401	4,270,080	3,958,668	5,289,498	1,667,367	3,373,293	12,078,668	7,573,379	6,361,741	10,140,781	77,060,894
Virginia	60,341,847	60,346,887	61,364,293	74,393,840	66,445,177	78,451,085	71,290,369	68,800,489	74,536,214	76,314,406	62,689,406	76,417,896	836,582,678
Washington	31,130,038	39,773,466	31,024,348	31,484,076	68,804,538	37,013,894	37,463,466	36,308,389	54,117,422	38,442,026	36,786,961	36,841,889	499,289,209
West Virginia	11,811,089	11,527,146	16,219,764	14,193,839	11,090,767	17,763,278	13,693,484	16,143,829	14,228,808	21,227,471	-	-	148,682,869
Wisconsin	49,736,537	42,757,487	43,311,992	51,889,264	60,013,424	62,299,784	58,377,012	52,484,278	61,846,961	61,998,838	53,399,700	60,357,372	621,972,563
Wyoming	14,867,060	27,529,762	18,343,115	18,010,617	21,408,249	21,454,949	19,841,378	23,734,789	9,766,699	27,119,140	20,687,157	21,689,347	280,148,957
U.S. Total 2/	2,198,376,027	2,062,334,130	2,248,870,019	2,469,386,185	2,612,867,412	2,427,344,153	2,497,240,660	2,366,931,338	2,430,608,306	3,435,117,316	2,283,326,776	1,789,109,239	28,672,903,260
Puerto Rico	37,010,056	3,984,784	23,020,894	11,028,322	14,714,410	31,084,743	44,676,380	11,998,889	13,907,074	19,717,333	14,884,460	14,388,900	230,691,298
Grand Total 2/	2,232,386,083	2,066,299,919	2,270,871,613	2,480,611,507	2,627,401,822	2,458,427,896	2,566,722,010	2,378,890,124	2,444,515,380	3,454,834,649	2,298,211,236	1,773,389,189	28,913,348,618

1/ This table shows gross volume of special fuels (primarily diesel fuel with small amounts of liquefied petroleum gas) reported by the State motor fuel tax agencies. To the extent possible, fuel consumed by Federal, State and local government agencies and all nonhighway use has been excluded from this table. Further adjustments may be made during the year and analysis. In many cases, the data reflect retail sales, but a number of States tax special fuels all the whole sale level. In some cases, corrections for interstate motor carrier use have not been made. When interstate motor carrier fuel volume is reported quarterly to FHWA, the volume is shown in the third month of the quarter. Highway use of special fuels is reported in table MF-21 in the annual report, Highway Statistics.

2/ Total includes only those States for which data are shown.

MONTHLY GASOLINE REPORTED BY STATES - 1992 1/

COMPILED FOR THE CALENDAR YEAR FROM STATE FUEL TAX REPORTS

(GALLONS)

TABLE MF-33GA AUGUST 1996

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	173,123,716	166,902,917	186,802,720	185,962,223	203,771,027	167,851,721	191,344,740	182,887,143	182,344,373	172,926,036	192,348,309	2,189,006,367
Alaska	18,787,348	17,696,337	18,615,601	19,482,904	23,083,029	24,144,374	27,456,794	30,787,836	27,986,948	28,244,448	21,986,540	18,176,623	273,398,788
Arizona	162,663,306	148,318,034	168,378,209	149,791,589	163,094,679	145,615,009	156,688,573	145,859,677	149,121,796	164,486,866	160,848,441	184,379,276	1,799,066,444
Arkansas	85,727,094	125,993,839	102,515,349	87,219,711	127,139,998	121,477,366	117,219,817	107,774,844	112,636,687	14,067,207	163,341,849	121,473,279	1,286,540,999
California	1,078,816,000	992,661,000	1,139,476,000	1,087,187,000	1,127,000,000	1,127,000,000	1,127,000,000	1,127,000,000	1,127,000,000	1,127,000,000	1,127,000,000	1,127,000,000	13,290,000,000
Colorado	120,466,227	117,431,756	121,618,057	120,456,889	129,927,406	134,851,497	144,638,151	142,137,923	131,773,306	137,818,378	121,311,679	134,999,872	1,567,417,128
Connecticut	113,471,017	105,722,045	115,836,095	114,701,794	122,939,167	120,032,965	120,340,961	119,227,021	116,029,963	122,836,263	114,985,616	128,589,773	1,411,171,700
Delaware	26,962,613	25,717,314	27,832,781	28,395,345	29,215,017	12,752,642	31,206,709	32,032,480	29,746,288	29,293,823	29,995,497	33,092,963	336,041,682
Dist. of Col.	13,823,496	14,403,380	14,874,273	14,093,805	15,667,803	15,415,601	15,462,464	14,486,891	14,580,599	15,103,064	13,843,298	14,666,782	176,379,426
Florida	526,941,714	525,062,039	515,720,303	867,887,424	532,131,812	516,817,612	907,379,430	519,151,087	817,168,806	803,408,948	511,131,398	549,541,999	6,262,342,097
Georgia	296,601,733	282,667,878	316,242,624	312,307,884	311,664,082	306,936,089	315,218,536	338,747,323	303,736,638	315,316,752	308,314,154	321,837,909	3,610,682,717
Hawaii	31,433,530	31,588,095	32,579,696	32,724,197	33,472,120	30,660,413	34,807,483	36,653,700	33,088,914	34,562,092	32,721,934	33,714,853	398,009,735
Idaho	43,006,667	33,299,817	44,778,435	30,211,306	37,772,238	47,119,497	43,390,427	44,960,279	50,714,756	50,219,786	51,661,009	41,820,934	519,175,226
Illinois	389,271,166	346,807,705	404,681,936	371,804,996	389,616,418	383,348,911	391,666,636	398,993,661	369,684,220	412,801,480	383,142,348	411,818,644	4,630,222,720
Indiana	210,687,820	199,980,028	224,765,341	226,735,272	238,693,013	234,167,418	242,657,831	240,994,497	226,407,518	244,306,961	222,420,577	240,649,183	2,752,264,459
Iowa	106,108,176	107,698,991	96,412,778	166,794,352	122,187,672	119,079,511	122,395,087	122,732,918	118,876,476	128,001,265	113,707,871	108,966,539	1,391,467,616
Kansas	97,292,673	92,200,299	99,944,635	102,185,420	107,182,788	107,658,446	111,718,239	106,812,767	80,823,028	108,003,180	99,863,636	108,247,796	1,221,719,864
Kentucky	153,645,480	180,198,867	159,285,222	161,047,487	166,169,280	168,697,928	171,701,785	170,191,188	168,437,409	165,805,512	150,145,583	173,841,343	1,963,466,049
Louisiana	150,349,734	147,356,880	135,313,439	168,216,201	192,616,493	161,467,566	161,787,227	166,139,692	169,114,712	159,274,531	170,169,915	170,348,872	1,980,155,289
Maine	47,269,530	44,170,068	46,059,111	43,462,630	52,402,732	51,272,661	50,693,966	51,685,072	50,166,098	51,497,872	49,642,175	48,291,723	612,499,598
Maryland	172,686,046	160,031,220	178,282,027	177,863,379	172,601,208	178,260,763	198,881,696	178,461,308	173,079,205	182,583,239	169,012,183	197,304,689	2,136,886,904
Massachusetts	191,415,872	180,636,799	198,675,000	204,077,306	205,000,033	204,013,766	209,362,018	208,163,322	199,532,815	210,370,661	196,602,826	208,722,049	2,416,571,697
Michigan	337,252,046	329,549,748	344,286,312	389,121,808	379,558,234	370,458,156	409,353,780	402,853,244	345,747,020	410,652,546	369,695,917	361,167,826	4,419,196,104
Minnesota	199,977,978	186,705,429	163,753,977	168,703,072	191,015,272	184,892,044	195,188,666	198,296,175	181,611,569	179,764,057	174,746,312	182,194,087	2,167,138,682
Mississippi	102,969,133	97,626,444	113,088,784	119,738,330	100,790,014	113,601,486	130,632,577	111,781,847	106,891,939	109,710,575	111,970,543	118,116,099	1,336,614,771
Missouri	221,805,245	206,693,944	233,661,166	234,399,704	232,473,149	248,942,632	276,586,242	242,960,767	231,986,642	247,839,642	228,300,190	242,032,605	2,844,741,928
Montana	31,960,969	31,662,054	33,881,153	36,066,930	39,342,608	43,130,295	49,666,220	49,372,660	39,432,803	39,394,631	36,182,763	36,771,526	468,060,611
Nebraska	59,427,208	56,875,801	59,993,628	65,414,998	68,078,066	69,018,201	68,482,940	69,436,352	66,123,313	69,160,879	62,994,105	68,732,398	785,139,883
Nevada	85,318,450	84,217,183	90,554,436	61,827,340	60,130,112	62,356,609	62,433,052	61,766,237	62,364,319	58,849,257	58,776,309	63,541,120	792,133,424
New Hampshire	42,753,391	39,921,449	41,940,885	43,526,614	43,986,835	44,845,904	49,248,443	48,792,187	44,620,393	46,930,965	41,563,890	44,682,532	527,725,088
New Jersey	275,609,096	230,936,744	280,330,912	283,373,829	341,120,811	321,219,914	288,029,178	296,666,326	301,924,972	313,140,868	305,800,890	332,046,647	3,569,893,868
New Mexico	66,988,386	65,649,712	68,137,193	63,991,149	81,631,291	71,821,348	76,685,080	73,144,254	76,054,130	73,466,877	66,852,439	73,808,782	857,930,636
New York	481,001,780	426,751,194	487,898,357	457,315,512	482,117,020	483,954,902	458,095,407	462,142,880	492,344,661	497,391,176	460,157,922	497,084,237	5,683,288,183
North Carolina	269,541,992	254,941,275	277,728,080	285,954,447	286,822,663	288,636,988	304,251,329	285,668,479	280,401,492	297,876,790	273,066,906	292,184,830	3,375,964,830
North Dakota	24,635,323	24,508,214	26,297,597	28,732,536	31,181,735	32,309,997	34,540,047	35,955,360	34,423,137	31,840,569	28,790,128	29,823,835	340,678,463
Ohio	364,494,529	345,753,643	370,474,603	383,258,969	414,304,776	411,222,210	419,096,758	405,136,329	387,615,234	412,101,944	380,261,976	418,925,429	4,797,247,399
Oklahoma	131,180,033	126,886,562	147,326,156	140,356,848	147,111,663	152,206,237	154,577,797	146,086,113	143,647,189	142,775,242	151,111,304	151,277,187	1,744,445,301
Oregon	92,348,800	100,282,961	114,190,501	107,701,173	122,882,826	122,829,327	129,800,613	129,546,671	116,926,430	121,274,719	106,730,698	108,216,839	1,379,969,458
Pennsylvania	370,123,172	356,254,089	386,238,955	386,212,896	408,178,699	394,494,503	409,080,936	403,428,977	389,539,134	412,724,822	389,246,854	409,300,050	4,701,895,037
Rhode Island	30,745,928	30,745,928	30,745,928	31,979,262	31,979,262	31,979,262	32,167,189	32,167,189	32,167,189	32,647,238	32,647,238	32,647,239	382,994,882
South Carolina	147,675,830	143,521,134	158,377,316	160,649,614	160,262,649	156,009,776	169,140,601	163,004,795	154,859,663	160,879,350	149,074,298	162,663,042	1,886,957,799
South Dakota	32,162,818	27,178,744	29,644,489	32,168,170	34,853,293	36,642,052	40,877,852	41,122,928	34,035,999	36,672,525	31,098,534	34,189,641	410,665,905
Tennessee	222,021,163	173,855,132	214,073,943	226,087,567	259,171,949	208,647,928	231,815,401	233,057,098	201,982,644	201,086,986	211,961,765	219,174,087	2,603,928,830
Texas	678,490,331	624,496,318	674,374,088	812,115,868	766,514,774	754,673,415	814,483,944	753,000,775	675,534,356	695,332,736	661,810,240	735,925,367	8,699,742,012
Utah	60,320,679	56,413,073	62,212,673	63,878,469	68,674,604	69,139,118	72,313,082	71,780,199	66,446,057	64,952,994	61,957,483	69,202,613	782,461,014
Vermont	24,026,470	22,889,285	23,606,740	19,855,854	23,259,411	23,487,089	30,862,820	30,633,899	26,083,690	27,321,820	22,985,123	24,461,111	299,542,412
Virginia	263,881,705	214,163,985	240,436,801	273,647,185	269,640,316	249,219,275	289,346,375	247,017,275	269,624,404	269,437,927	229,476,053	287,926,538	3,093,817,830
Washington	184,234,114	180,568,041	199,853,506	199,366,616	205,405,436	207,300,233	219,847,372	221,836,286	203,197,085	203,139,166	192,512,442	196,014,708	2,413,294,997
West Virginia	61,843,779	64,562,656	71,866,679	69,739,972	70,019,931	70,600,491	78,885,482	70,867,808	81,310,138	68,781,128	72,234,279	77,826,072	857,737,065
Wisconsin	168,998,808	158,963,102	187,963,444	171,801,746	199,025,589	182,865,872	199,639,627	198,609,893	178,654,115	189,768,630	175,845,809	188,254,936	2,170,370,212
Wyoming	21,947,212	18,261,064	23,950,788	30,100,073	19,382,826	25,699,736	28,713,935	35,160,881	30,679,436	31,789,756	23,242,256	31,943,112	330,867,080
U.S. Total	9,142,806,036	8,672,697,841	9,338,380,649	9,662,336,747	9,941,263,119	10,445,571,869	10,198,426,891	9,895,352,982	9,822,346,348	9,756,429,004	9,371,073,937	9,857,129,479	118,824,006,452
Puerto Rico	71,872,317	66,211,938	76,387,301	77,211,937	82,773,529	74,752,427	68,865,297	71,486,899	79,019,883	76,374,524	71,380,897	77,223,386	873,480,417
Grand Total	9,214,678,352	8,737,669,779	9,414,767,950	9,739,548,684	10,024,036,648	10,520,324,296	10,267,273,188	9,966,839,881	9,901,366,229	9,832,803,528	9,442,454,834	9,934,352,865	119,697,846,869

1/ This table shows gross volume of gasoline reported by wholesale distributors in each State. The data are taken from State taxation reports and may reflect time lags of 6 weeks or more between the wholesale and retail levels. The data include highway use, nonhighway use, and losses.

MONTHLY GASOLINE REPORTED BY STATES - 1993[1]

COMPILED FOR THE CALENDAR YEAR FROM STATE FUEL TAX REPORTS

(GALLONS)

TABLE MF-33GA DECEMBER 1994

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	168,300,156	168,146,856	184,479,705	189,799,847	187,108,045	190,267,866	196,781,989	194,022,305	185,535,018	180,332,777	185,533,629	195,129,589	2,224,434,610
Alaska	12,020,309	20,094,343	20,775,782	17,908,933	20,972,272	22,684,304	20,507,799	23,262,685	28,254,470	26,168,376	18,327,742	26,426,967	275,483,631
Arizona	136,086,595	141,304,270	150,329,895	159,577,017	157,327,170	163,192,362	163,554,673	160,284,694	154,746,767	163,516,730	148,173,084	172,599,362	1,815,124,334
Arkansas	121,159,966	120,806,543	132,386,752	81,311,853	119,932,566	118,306,998	118,287,783	117,698,338	118,276,533	21,674,337	126,612,266	134,996,739	1,312,360,894
California	1,064,363,777	986,628,000	1,080,621,000	1,111,600,000	1,116,621,000	1,079,000,000	1,091,000,000	1,091,000,000	1,091,000,000	1,091,000,000	1,091,000,000	1,091,000,000	[illegible]
Colorado	128,396,883	116,928,021	138,892,508	121,032,686	136,528,356	143,276,849	154,916,926	151,328,668	141,616,739	142,185,894	132,066,797	137,197,306	1,635,868,338
Connecticut	111,821,910	108,917,629	117,994,197	116,874,016	114,672,826	118,821,340	122,426,861	120,716,041	116,860,832	121,823,720	118,152,730	123,684,983	1,409,765,249
Delaware	29,214,928	26,032,914	28,214,670	29,886,737	30,764,376	32,729,511	33,316,311	34,919,099	28,771,082	29,417,426	28,291,663	30,753,377	354,866,210
Dist. of Col	14,267,210	13,561,829	14,830,312	15,327,485	15,217,128	15,009,323	16,006,892	15,227,057	14,908,248	16,219,406	14,685,830	15,320,751	180,631,481
Florida	561,123,824	533,323,693	549,230,511	567,722,281	556,822,754	546,957,105	526,398,568	561,094,729	549,484,797	606,501,387	604,470,104	626,576,406	6,684,682,648
Georgia	330,961,334	363,362,333	311,399,471	334,391,127	325,969,980	336,431,786	339,548,157	331,450,662	316,774,786	308,587,684	311,347,120	367,630,084	3,967,794,364
Hawaii	32,084,957	30,871,286	32,733,804	33,312,215	33,841,716	33,906,291	30,661,899	28,234,290	33,987,618	33,351,238	33,187,829	34,146,738	399,871,671
Idaho	40,148,082	40,711,993	34,053,948	40,194,314	43,056,909	45,103,859	45,022,425	51,981,629	54,008,752	45,314,242	42,954,457	49,648,006	552,164,806
Illinois	336,986,174	378,570,123	383,561,001	387,060,603	386,799,378	377,486,216	444,197,770	426,861,787	388,647,802	402,114,689	392,090,681	410,949,810	4,713,807,964
Indiana	212,886,617	207,188,144	229,285,676	232,006,661	241,874,409	238,659,130	266,456,866	262,261,708	234,634,282	244,852,700	234,617,683	244,021,827	2,829,740,703
Iowa	112,005,049	93,741,711	116,046,984	124,129,969	120,836,690	122,995,273	129,346,118	127,459,184	120,574,861	125,576,861	117,753,301	128,067,009	1,418,382,909
Kansas	92,718,083	88,488,393	102,371,045	92,171,382	104,993,592	112,937,961	113,822,227	109,456,312	103,210,867	101,068,320	104,948,668	109,868,017	1,237,723,678
Kentucky	54,028,326	240,430,616	88,695,548	177,787,487	199,896,363	176,232,212	172,844,601	187,973,553	167,066,023	171,123,913	164,191,827	188,867,104	1,993,837,400
Louisiana	147,623,542	147,429,981	164,843,220	163,653,391	154,983,414	177,953,867	204,669,178	171,781,638	165,019,281	163,810,562	188,635,126	178,621,102	1,977,624,269
Maine	48,098,426	44,964,531	47,713,861	45,889,826	51,163,482	54,108,301	60,996,090	61,916,980	51,920,587	53,131,533	51,622,488	49,361,212	617,258,904
Maryland	160,947,866	161,224,888	176,167,672	179,086,172	174,057,247	181,443,201	188,406,030	184,446,395	180,925,406	173,375,673	176,330,400	187,986,656	2,123,367,699
Massachusetts	189,400,604	177,863,378	194,725,857	192,684,536	213,646,223	201,166,970	211,745,686	212,214,762	201,266,761	210,370,717	200,426,868	210,926,845	2,416,089,908
Michigan	337,113,660	318,999,890	367,574,767	351,761,349	382,243,544	399,655,619	412,427,482	359,916,166	339,040,498	483,941,935	387,441,731	388,537,548	4,528,533,998
Minnesota	168,691,214	163,861,332	172,759,108	175,122,913	186,140,732	200,435,282	198,343,103	200,721,806	191,670,089	188,629,400	186,240,739	192,239,800	2,219,760,080
Mississippi	100,668,598	106,974,857	119,878,663	113,830,107	120,136,708	119,126,667	126,284,516	121,326,768	112,101,169	106,720,548	122,159,082	122,898,426	1,392,101,781
Missouri	210,567,376	203,188,629	227,390,367	244,094,286	244,327,706	248,309,217	280,948,758	266,341,673	238,900,560	241,886,868	234,227,566	245,832,151	2,889,886,053
Montana	31,378,266	30,482,578	34,821,860	36,438,714	39,251,249	33,030,671	33,600,892	43,666,615	38,865,364	36,798,775	36,287,464	41,380,619	437,005,149
Nebraska	88,893,872	82,680,762	90,892,478	80,318,982	60,086,930	66,417,269	70,699,506	71,688,658	67,787,997	66,348,879	67,199,086	72,013,419	771,836,838
Nevada	57,893,666	50,663,818	51,836,870	57,472,881	57,103,173	59,733,809	60,045,832	63,603,650	66,454,293	60,314,743	64,226,298	57,784,364	705,883,363
New Hampshire	41,164,630	40,729,998	42,965,014	41,770,571	44,742,938	45,890,736	49,833,736	50,300,173	44,832,677	47,313,367	43,106,878	45,861,985	537,912,703
New Jersey	242,313,367	242,313,367	246,298,644	214,973,060	167,672,823	321,780,891	239,956,898	289,086,341	264,095,936	263,763,809	233,374,343	271,764,519	3,006,886,468
New Mexico	73,813,166	108,280,626	73,898,910	66,349,699	81,370,362	76,999,394	72,018,136	76,123,789	77,032,987	78,805,889	68,774,262	86,736,793	870,111,212
New York	513,986,161	461,846,847	434,801,799	446,616,150	481,668,868	468,277,612	457,100,330	482,895,902	484,345,758	474,572,864	486,868,971	521,737,167	5,686,657,619
North Carolina	288,387,026	263,861,011	288,648,212	294,782,635	296,376,778	297,908,473	310,393,319	307,498,215	283,606,864	298,663,499	293,316,083	301,989,885	3,516,431,670
North Dakota	19,737,862	29,822,607	26,653,438	29,749,791	30,386,727	31,716,148	33,598,266	28,063,274	27,648,077	26,219,006	29,142,627	26,760,106	349,498,931
Ohio	370,826,290	352,916,063	386,258,801	369,581,178	419,979,862	421,086,782	426,280,116	423,613,420	409,698,751	440,304,356	412,727,008	434,727,908	4,967,864,889
Oklahoma	126,109,276	137,907,375	146,966,408	142,261,000	160,969,308	168,701,532	189,378,424	181,061,881	161,838,069	163,889,677	148,996,008	184,734,877	1,969,784,099
Oregon	83,407,297	187,580,665	116,274,732	99,981,011	130,894,591	136,311,401	134,006,678	132,719,884	127,796,493	131,681,627	116,030,998	117,646,079	1,653,056,612
Pennsylvania	369,647,643	343,409,666	370,895,606	394,123,622	410,451,773	387,927,582	426,244,491	426,330,706	392,712,765	419,773,704	394,734,302	418,922,725	4,771,284,975
Rhode Island	29,649,681	29,649,681	29,649,683	32,496,016	32,496,016	32,496,016	33,162,999	33,162,999	33,162,999	32,774,678	32,774,678	32,774,677	383,649,428
South Carolina	148,042,188	144,118,993	160,540,187	167,680,419	162,637,265	164,326,155	173,512,461	168,548,613	160,331,071	157,166,009	157,555,168	166,869,543	1,972,159,096
South Dakota	29,403,338	26,376,362	32,482,896	31,342,074	33,808,560	38,784,168	42,047,862	42,898,762	38,976,108	34,634,763	33,696,140	34,003,794	415,050,991
Tennessee	273,266,245	128,180,017	230,230,886	214,877,939	238,750,613	230,021,801	244,902,603	241,004,838	208,601,432	226,362,712	216,079,648	248,888,156	2,648,389,289
Texas	698,573,475	660,061,244	729,387,121	730,071,934	754,416,997	760,921,804	785,711,086	775,473,771	743,643,091	741,172,306	758,716,209	784,633,831	8,883,758,869
Utah	59,670,512	60,660,215	61,467,792	60,683,133	72,079,640	72,630,670	77,113,700	77,508,834	78,096,491	69,408,742	64,214,140	70,908,834	820,703,863
Vermont	23,291,826	23,606,321	24,747,614	22,726,836	24,920,248	26,227,613	29,163,947	29,620,586	25,971,906	26,864,692	23,980,598	25,331,011	306,589,698
Virginia	244,174,318	225,422,618	246,398,762	276,731,307	268,304,525	289,832,378	284,930,812	273,668,100	268,488,157	269,127,526	273,809,866	275,298,446	3,146,762,040
Washington	176,187,278	191,827,628	208,180,111	197,752,664	212,851,677	208,613,931	218,799,928	229,468,662	214,204,588	220,675,361	210,322,928	218,322,827	2,487,206,609
West Virginia	40,088,775	81,573,369	76,709,955	73,924,039	68,007,801	76,336,802	77,363,688	63,905,865	81,156,133	69,985,040	62,366,671	70,272,266	840,647,084
Wisconsin	164,371,048	162,517,430	178,091,322	169,068,534	188,825,762	198,984,957	209,199,088	202,800,910	183,731,166	192,974,184	186,079,214	193,984,632	2,227,008,100
Wyoming	21,563,820	21,248,830	24,482,192	21,207,467	19,684,448	20,578,580	29,722,873	23,945,747	42,885,530	32,766,643	31,476,484	28,979,905	323,641,219
U.S. Total	8,822,144,678	9,090,732,944	9,446,579,228	9,881,693,140	9,905,081,061	10,092,431,453	10,479,990,981	10,243,229,663	9,801,383,603	9,872,295,862	9,664,644,998	10,215,521,830	117,436,931,989
Puerto Rico	77,776,251	67,945,034	69,197,628	83,021,389	83,734,740	72,672,786	76,318,489	72,161,976	76,084,780	76,547,251	73,216,150	73,314,362	903,991,836
Grand Total	8,899,920,929	9,158,677,978	9,515,776,856	9,964,960,128	9,988,295,800	10,165,104,199	10,556,309,470	10,315,391,639	9,877,468,383	10,048,843,113	9,737,861,148	10,288,836,192	118,340,627,792

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MONTHLY GASOLINE REPORTED BY STATES - 1994[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL-TAX REPORTS

(GALLONS)

TABLE MF-33GA
MAY 1995

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	174,602,093	171,004,125	198,981,992	189,074,436	199,227,916	199,327,916	192,566,914	201,141,898	187,108,298	186,974,845	180,017,299	196,783,680	2,281,783,022
Alaska	29,580,323	17,675,926	14,494,130	23,443,286	15,397,812	25,192,526	27,288,113	32,677,365	37,363,397	28,778,810	30,321,302	32,135,133	357,348,270
Arizona	152,842,629	153,030,480	196,668,016	168,178,323	182,249,062	183,463,597	161,116,657	185,818,408	167,216,491	161,568,942	154,706,284	181,420,173	1,926,666,062
Arkansas	88,787,474	179,914,598	86,077,911	123,436,000	117,916,377	134,331,792	119,026,980	112,408,779	116,246,029	97,599,404	108,529,603	129,126,888	1,393,371,412
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Colorado	133,634,005	123,701,044	137,369,364	134,071,780	143,244,929	148,875,975	166,218,089	151,887,529	147,336,993	142,733,388	134,611,861	144,008,288	1,664,668,756
Connecticut	111,829,915	104,346,906	118,080,722	112,993,308	118,808,473	121,214,014	124,741,914	120,687,813	113,966,464	124,663,867	117,003,777	117,875,857	1,432,618,730
Delaware	24,666,901	28,029,847	29,116,479	29,379,648	49,266,306	53,090,943	53,349,789	53,662,956	29,903,579	30,182,690	28,248,159	31,447,009	367,274,132
Dist. of Col.	13,848,822	14,798,249	15,966,220	15,441,553	14,566,875	14,793,629	15,317,739	14,686,446	15,513,309	16,020,406	14,654,748	15,376,193	182,184,209
Florida	556,644,366	520,879,017	634,375,437	604,124,866	566,068,885	553,501,863	531,622,161	598,512,339	545,602,419	518,397,493	541,704,996	634,060,940	6,596,497,401
Georgia	306,631,929	303,145,163	293,401,551	301,135,496	336,291,514	327,578,009	334,468,497	340,923,082	362,052,416	337,127,367	324,196,162	348,407,800	3,992,477,076
Hawaii	33,170,669	31,508,041	33,929,879	33,679,745	40,907,782	24,719,157	44,139,614	29,939,877	35,808,736	37,663,377	29,246,623	39,776,361	414,479,830
Idaho	37,950,133	43,503,683	46,205,115	37,395,388	47,202,296	42,919,763	47,469,745	52,823,841	46,343,167	56,238,894	50,386,949	48,070,776	558,509,417
Illinois	323,772,674	367,299,471	369,109,200	385,436,282	410,199,114	368,089,247	485,725,762	575,286,158	371,616,834	394,883,585	372,642,102	384,383,584	4,764,842,963
Indiana	226,104,817	206,104,883	236,939,436	236,910,791	252,070,883	248,972,672	268,503,712	243,080,934	237,715,282	252,438,177	259,142,280	261,884,414	2,864,834,798
Iowa	111,738,860	102,482,482	117,413,549	119,417,811	123,454,494	132,847,679	131,714,131	129,606,130	124,393,043	126,853,300	107,286,842	136,713,445	1,463,895,766
Kansas	97,640,283	95,142,233	107,204,687	103,239,710	110,903,704	107,228,279	110,894,382	111,965,300	105,693,701	105,263,793	104,287,202	110,386,376	1,287,191,200
Kentucky	51,802,227	239,816,455	199,028,822	177,363,423	171,182,479	166,638,221	175,127,348	180,151,231	171,679,217	160,168,314	160,668,954	179,583,893	1,992,079,681
Louisiana	168,929,461	130,071,698	174,604,108	163,536,710	178,223,634	167,866,694	166,701,181	178,256,817	170,017,230	167,905,445	162,922,628	180,263,960	1,956,268,066
Maine	31,748,685	62,613,843	47,866,008	43,681,318	54,643,753	49,469,108	66,823,906	68,701,461	42,423,457	50,908,462	57,578,792	52,494,548	629,546,950
Maryland	186,463,236	168,923,698	183,926,629	181,123,672	188,075,034	186,614,115	188,395,353	191,981,720	178,914,654	182,993,898	180,676,283	189,749,387	2,173,837,481
Massachusetts	192,027,679	182,884,707	196,988,778	196,462,980	211,666,554	210,130,779	215,390,293	219,542,801	202,798,185	210,655,866	201,088,936	214,462,217	2,454,029,291
Michigan	384,798,786	337,491,367	381,891,877	361,797,039	396,732,681	407,323,427	423,163,334	417,831,396	435,116,317	367,269,468	368,092,042	383,163,928	4,596,141,692
Minnesota	178,999,666	166,769,543	178,677,228	177,206,179	195,917,148	200,499,635	204,664,340	208,525,715	193,640,119	193,962,303	187,567,812	192,377,623	2,298,973,306
Mississippi	102,449,108	110,943,921	123,570,990	122,165,697	127,432,007	121,417,909	126,951,308	132,273,138	96,494,000	110,692,909	114,515,842	131,053,900	1,419,910,736
Missouri	238,025,046	209,413,674	234,612,913	249,846,036	248,133,228	258,074,313	245,014,299	271,221,339	241,880,510	245,972,607	213,328,795	273,170,419	2,916,693,382
Montana	36,492,173	38,482,487	36,067,638	37,048,980	41,671,848	49,327,210	48,467,835	49,997,706	40,309,396	40,623,537	37,658,561	39,328,488	476,975,895
Nebraska	78,366,773	54,775,330	61,088,422	61,641,706	64,013,623	66,388,027	66,395,989	63,947,942	63,789,016	64,829,692	64,512,532	64,641,867	773,330,909
Nevada	59,717,389	56,658,288	62,994,995	66,579,603	69,822,179	61,668,994	66,258,612	66,794,900	67,851,689	61,360,541	65,139,259	59,408,527	742,227,746
New Hampshire	43,942,798	48,617,280	42,961,025	42,266,142	45,795,734	47,907,671	50,666,892	53,209,645	46,864,391	48,078,247	43,326,680	47,264,508	554,578,463
New Jersey	244,032,200	238,725,875	292,674,631	290,054,606	306,057,660	308,023,495	293,278,936	317,974,822	289,466,789	297,762,156	298,499,996	313,066,393	3,486,575,331
New Mexico	57,921,807	99,242,476	73,746,680	66,492,424	76,598,216	81,080,799	82,368,946	80,672,800	73,784,098	77,910,670	67,813,602	83,637,981	920,640,699
New York	461,039,036	474,483,167	462,012,642	375,664,174	445,421,407	453,646,153	466,297,530	477,295,488	497,618,610	442,337,877	481,884,691	508,765,861	5,543,466,926
North Carolina	254,580,578	267,119,027	309,317,456	301,328,400	311,784,863	302,049,691	308,709,099	328,816,772	301,367,540	295,367,947	291,476,119	322,735,305	3,676,652,794
North Dakota	24,281,843	26,288,001	26,092,681	29,622,637	32,494,661	33,050,872	33,964,570	37,350,264	32,739,137	27,648,077	28,899,266	30,051,761	362,483,650
Ohio	366,946,772	306,897,061	394,954,774	401,243,230	421,300,096	442,578,428	430,436,267	448,136,072	389,652,470	408,453,348	409,082,608	426,627,191	4,886,312,183
Oklahoma	122,479,600	153,216,217	150,568,302	150,858,612	154,358,849	159,100,780	157,210,307	153,566,675	145,261,025	150,014,315	144,661,240	156,783,006	1,798,070,187
Oregon	104,618,382	104,067,713	116,646,199	119,667,380	122,426,125	125,272,834	136,207,458	134,550,294	110,263,376	142,577,311	93,250,723	142,961,240	1,450,928,037
Pennsylvania	361,042,319	334,673,070	388,481,357	392,116,893	411,649,715	406,881,298	414,066,723	422,981,791	395,453,261	413,113,355	395,457,878	419,466,786	4,754,538,846
Rhode Island	29,793,796	29,793,790	29,793,790	31,072,961	31,072,961	31,072,961	31,148,622	31,148,622	31,148,622	31,801,760	31,801,760	31,801,760	371,451,401
South Carolina	130,032,948	143,304,931	166,901,995	166,889,391	158,365,731	166,489,180	170,453,878	182,396,612	161,892,088	157,184,049	161,366,273	166,964,572	1,950,430,716
South Dakota	29,254,694	27,644,611	31,921,649	33,170,259	37,017,053	40,484,024	43,116,386	42,373,305	36,748,360	36,516,880	34,857,258	34,801,558	427,852,761
Tennessee	216,306,321	163,952,378	229,628,466	244,273,507	250,586,687	233,312,668	227,739,302	251,917,938	224,139,312	228,877,926	234,716,695	236,716,011	2,729,227,101
Texas	669,166,384	771,159,275	803,248,532	773,582,431	837,247,673	797,466,896	801,671,422	802,543,859	778,910,534	766,678,373	756,318,746	821,422,674	9,363,421,201
Utah	64,356,178	89,725,866	68,992,282	68,988,731	74,015,261	76,436,534	79,186,940	81,408,831	73,006,501	72,766,252	69,053,908	66,151,924	857,088,208
Vermont	24,788,233	23,204,703	29,925,722	22,724,469	26,289,043	23,782,649	26,484,470	30,366,567	26,071,444	27,185,947	24,283,889	25,470,685	309,581,821
Virginia	238,964,325	211,796,474	288,111,043	262,640,534	271,336,581	293,664,147	268,516,412	290,191,314	288,427,768	268,978,260	265,087,645	279,329,132	3,214,216,635
Washington	186,289,186	181,954,437	205,784,680	207,057,007	218,380,986	213,136,199	221,400,099	222,157,229	206,790,575	207,615,328	198,516,040	202,232,231	2,471,915,999
West Virginia	73,614,553	91,809,091	76,742,963	69,758,829	77,335,115	85,047,270	78,288,332	69,219,324	61,270,699	63,192,475	69,194,126	74,287,027	856,726,804
Wisconsin	167,481,544	169,476,207	170,876,799	160,897,819	222,884,389	198,151,899	215,867,787	209,447,115	194,978,673	195,674,870	198,669,970	186,027,341	2,299,634,113
Wyoming	26,491,242	22,183,116	22,033,707	20,439,373	24,374,782	20,633,008	32,423,681	34,673,788	37,367,979	29,615,535	30,730,010	26,384,482	329,350,703
U.S. Total	8,870,499,288	9,202,198,346	9,769,818,067	9,640,108,089	10,336,897,899	10,201,747,839	10,306,333,487	10,730,337,467	10,047,705,486	9,893,483,982	9,843,258,104	10,401,276,369	119,437,665,341
Puerto Rico	77,292,887	68,665,621	75,805,628	80,512,745	78,965,130	87,009,363	72,683,341	91,106,161	77,468,258	84,494,000	80,847,905	78,931,982	953,777,219
Grand Total	8,947,792,172	9,267,863,989	9,845,623,695	9,720,621,334	10,417,863,029	10,288,757,202	10,381,016,828	10,811,443,628	10,125,174,743	9,977,977,982	9,923,906,009	10,480,208,351	120,388,649,260

1/ The table shows gross volume of gasoline reported by wholesale distributors in each State. The data are taken from State taxation reports and may reflect time lags of 6 weeks or more between the wholesale and retail levels. The data include highway use, nonhighway use, and losses.

MONTHLY GASOLINE REPORTED BY STATES - 1995[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL TAX REPORTS

TABLE MF-33GA
JUNE 1997

(GALLONS)

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	177,860,988	168,199,400	196,308,043	182,929,398	199,316,401	199,014,487	198,946,669	202,308,314	191,996,618	204,492,857	202,294,844	227,239,593	2,348,286,771
Alaska	10,638,157	42,216,839	16,891,813	35,707,389	26,100,361	21,208,467	33,980,109	31,406,043	39,756,409	20,100,177	30,172,619	22,446,439	330,630,812
Arizona	112,034,443	127,154,897	240,837,617	172,101,141	168,038,389	165,164,259	171,906,139	162,672,192	157,937,582	160,642,164	157,265,004	168,811,621	1,998,567,638
Arkansas	29,453,931	143,046,866	95,864,043	108,956,405	127,281,171	109,180,108	164,304,931	118,404,156	97,667,337	121,173,923	93,516,866	147,660,920	1,377,141,327
California	1,023,742,000	1,090,281,000	1,112,164,000	1,063,346,000	1,125,975,000	1,130,902,000	1,149,289,000	1,164,672,000	1,093,809,000	1,134,563,000	1,128,026,000	1,121,530,000	13,368,139,000
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	107,291,767	104,221,891	113,754,148	110,362,126	117,750,118	117,406,930	113,185,298	119,089,136	110,632,569	118,241,394	39,347,413	123,940,592	1,392,737,342
Delaware	27,356,707	27,778,340	28,872,436	29,446,690	30,836,669	13,722,618	32,117,436	33,285,300	29,326,282	29,866,440	29,299,173	29,080,415	360,634,334
Dist. of Col.	8,813,032	12,954,181	15,854,017	20,384,870	14,766,679	15,089,864	15,012,483	16,201,495	15,263,158	16,450,616	16,663,430	11,734,417	179,290,242
Florida	569,166,748	559,486,183	533,951,771	634,040,494	625,745,801	513,643,612	598,807,333	663,906,903	586,422,804	625,608,371	565,761,262	600,989,679	6,745,820,481
Georgia	322,172,781	305,219,178	355,971,577	339,785,046	352,353,055	354,127,117	353,192,803	359,757,229	334,782,270	349,678,664	340,613,677	363,861,074	4,121,314,470
Hawaii	33,156,211	27,548,050	36,729,866	29,942,695	38,398,756	35,312,975	35,495,760	38,262,272	38,798,851	30,425,866	33,784,850	41,864,780	419,111,198
Idaho	45,145,928	42,200,319	42,610,020	37,119,947	47,433,866	44,024,405	51,124,197	51,581,166	47,029,380	46,998,397	53,100,350	49,745,152	578,213,137
Illinois	371,345,930	354,407,805	346,467,480	393,091,177	417,572,705	409,341,926	413,319,386	411,386,281	383,171,109	394,807,088	381,238,738	423,373,980	4,699,523,577
Indiana	222,208,067	206,653,394	251,007,418	241,059,266	242,733,578	259,109,230	300,226,867	271,328,788	246,586,612	256,971,347	247,573,193	280,228,488	2,992,880,238
Iowa	111,112,822	103,718,297	106,176,700	130,193,955	130,036,443	132,547,608	130,871,389	134,421,699	135,766,593	131,254,762	116,384,508	127,932,704	1,481,187,187
Kansas	98,744,728	93,021,361	107,033,814	99,708,801	107,906,473	97,846,637	114,291,500	115,880,776	106,350,709	111,054,232	108,441,403	109,044,140	1,265,324,124
Kentucky	136,561,141	164,199,378	166,907,814	174,016,147	176,903,293	177,709,863	165,380,180	186,307,893	186,213,270	175,024,790	164,109,286	178,989,489	2,061,182,313
Louisiana	157,566,414	145,419,313	175,424,691	167,975,533	179,304,304	172,480,694	166,876,826	174,016,775	174,380,783	162,126,603	168,250,264	164,977,808	2,009,640,008
Maine	36,217,730	60,011,400	51,060,096	66,213,824	68,063,966	38,708,416	51,032,963	58,084,023	56,364,156	41,214,997	40,480,430	70,704,920	8,140,698,880
Maryland	169,329,707	166,009,794	168,851,589	174,164,012	188,673,822	186,348,330	190,786,210	199,185,816	174,185,689	187,089,945	182,310,717	193,111,873	2,179,888,974
Massachusetts	195,584,340	183,128,086	206,164,934	199,714,872	216,330,022	219,806,091	217,644,287	227,592,853	206,594,634	213,385,421	208,541,251	215,643,503	2,509,830,140
Michigan	321,733,567	319,293,117	380,295,447	402,215,179	473,849,182	430,631,671	402,168,184	432,719,706	377,890,666	404,218,436	338,726,799	486,414,921	4,719,857,105
Minnesota	181,284,447	160,413,428	181,646,779	174,314,004	200,280,736	214,237,661	207,067,186	215,484,349	196,949,913	201,214,900	190,846,348	195,536,695	2,319,257,986
Mississippi	103,509,943	104,936,460	129,251,531	128,672,983	129,260,105	116,406,369	130,658,673	126,198,956	114,949,852	127,761,177	105,312,930	137,325,809	1,483,734,523
Missouri	220,272,000	211,530,363	248,509,101	238,275,686	247,174,607	255,099,978	261,180,192	272,130,922	247,472,983	252,845,329	240,197,856	247,018,489	2,941,657,808
Montana	32,948,627	31,002,846	35,435,886	34,131,820	41,971,244	45,648,763	50,714,732	51,824,664	42,853,066	43,961,801	36,766,665	37,853,708	481,392,808
Nebraska	66,052,243	59,086,298	64,977,336	62,861,409	66,820,890	62,936,753	71,886,126	71,129,607	67,010,146	70,087,436	66,819,384	66,822,742	817,648,084
Nevada	61,926,807	58,140,274	56,076,651	63,361,179	61,131,285	65,104,739	66,090,807	69,062,480	70,375,339	64,477,800	66,429,487	61,579,635	762,755,893
New Hampshire	43,383,221	41,414,484	45,367,648	42,966,864	48,791,857	49,864,526	52,371,340	58,464,988	48,418,643	49,788,832	47,018,331	49,320,301	574,081,102
New Jersey	287,071,746	263,056,546	306,610,073	280,107,612	309,101,807	287,878,540	320,984,912	284,483,626	273,173,778	292,103,457	302,508,114	347,538,479	3,584,618,690
New Mexico	39,828,964	39,075,899	76,863,066	76,166,727	76,032,487	68,780,700	90,261,923	70,168,754	75,569,110	74,753,808	71,284,200	74,030,886	888,448,629
New York	461,431,150	390,324,908	484,282,259	475,097,578	497,895,833	497,089,716	498,566,119	458,646,077	421,168,923	509,574,178	469,718,721	523,801,639	5,662,579,101
North Carolina	274,256,494	272,932,811	308,779,830	307,109,633	320,216,943	319,121,643	348,852,336	331,644,334	300,722,896	313,925,313	308,124,693	318,532,048	3,691,238,974
North Dakota	21,267,803	28,732,762	26,839,157	28,667,915	32,727,226	32,176,419	36,401,594	37,502,715	33,213,908	32,540,511	28,978,961	30,256,919	370,341,886
Ohio	390,999,532	368,737,734	404,490,534	389,631,219	441,986,933	424,297,264	480,148,227	451,407,727	413,756,898	417,020,734	417,990,176	412,562,924	4,962,970,402
Oklahoma	138,033,000	144,457,165	163,847,578	149,316,966	156,463,480	158,381,362	160,626,394	159,310,253	148,961,207	146,480,545	140,404,891	1,813,977,301
Oregon	60,460,006	134,463,668	137,949,189	120,484,012	123,670,639	114,982,230	102,758,880	132,178,281	135,918,001	125,183,000	97,698,080	108,771,290	1,661,404,386
Pennsylvania	370,478,195	344,816,699	401,560,795	389,828,680	418,977,986	419,699,436	417,536,057	432,357,266	392,790,004	415,761,009	403,578,876	399,300,258	4,800,707,868
Rhode Island	30,222,974	30,222,974	30,222,975	31,815,631	31,815,631	31,815,631	32,534,156	32,534,156	32,534,156	32,312,316	32,312,316	32,312,316	380,666,229
South Carolina	151,942,824	147,028,684	171,129,460	166,802,925	171,801,305	173,099,892	175,473,664	176,177,249	158,544,816	169,668,301	165,245,792	164,088,748	1,989,943,067
South Dakota	29,365,664	28,010,588	32,416,612	30,536,116	36,886,396	41,982,557	40,293,462	44,364,238	37,169,279	37,126,811	34,366,986	32,970,826	426,438,414
Tennessee	241,318,383	174,408,887	211,044,866	242,754,980	260,899,175	231,664,103	245,964,999	262,307,716	226,307,180	216,783,522	248,457,316	229,600,826	2,779,993,891
Texas	638,784,904	694,251,954	748,246,256	781,512,996	793,874,449	767,812,090	724,826,830	803,427,697	767,109,736	793,248,564	749,071,136	808,793,307	9,044,956,929
Utah	67,987,362	66,236,867	72,023,318	71,695,112	77,451,819	80,235,205	85,100,196	85,193,600	76,157,757	76,845,848	69,000,303	78,160,309	901,887,094
Vermont	23,767,845	20,812,912	23,277,388	22,780,270	26,716,898	27,982,008	28,859,566	28,376,991	26,840,364	27,361,952	25,286,590	26,197,878	308,009,321
Virginia	267,840,318	242,434,698	284,344,383	248,980,038	257,398,411	280,681,082	228,997,279	280,400,258	243,212,879	304,064,335	271,932,994	284,321,728	3,334,480,403
Washington	189,086,230	181,706,775	208,844,407	203,816,960	219,266,290	216,264,889	223,087,277	229,275,244	210,903,818	210,150,890	209,489,919	202,489,792	2,498,141,670
West Virginia	63,032,754	59,760,108	66,764,564	66,386,326	71,971,681	86,079,744	78,678,190	71,996,988	76,431,940	70,516,942	68,829,613	83,270,538	885,668,347
Wisconsin	173,613,485	167,208,228	188,937,222	172,292,506	207,201,900	219,707,673	216,646,839	218,992,162	201,802,060	203,677,077	197,013,461	197,673,336	2,362,774,349
Wyoming	22,214,246	24,787,807	23,457,277	22,564,219	26,190,783	24,447,614	28,121,669	30,137,152	24,647,314	42,038,749	28,868,008	27,670,898	343,086,385
U.S. Total	9,067,824,680	9,077,304,395	9,997,474,892	9,889,947,695	10,366,376,681	10,304,786,129	10,631,870,932	10,828,766,127	10,082,416,257	10,300,091,631	9,966,835,862	10,470,710,848	120,990,349,089
Puerto Rico	79,214,063	87,196,067	78,463,803	66,294,308	79,735,600	63,990,077	97,179,221	88,081,032	92,705,592	86,907,253	74,270,325	81,337,686	994,691,617
Grand Total	9,147,038,743	9,164,501,062	10,075,938,695	9,956,244,003	10,446,112,281	10,368,776,206	10,729,050,153	10,916,847,159	10,175,121,849	10,387,000,884	9,841,106,187	10,552,048,534	121,985,042,706

1/ This table shows gross volume of gasoline reported by wholesale distributors in each State. The data are taken from State taxation reports and may reflect time lags of 6 weeks or more between the wholesale and retail levels. The data include highway use, nonhighway use, and losses.

MONTHLY GASOLINE REPORTED BY STATES - 1996[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL-TAX REPORTS

(GALLONS)

TABLE MF-33GA
APRIL 1996

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	164,947,750	171,329,494	190,246,058	199,764,010	208,635,555	193,001,858	210,246,861	206,208,904	187,178,807	199,677,130	187,684,674	199,357,669	2,328,272,920
Alaska	24,132,073	19,504,721	22,054,222	20,567,618	23,612,147	27,711,939	29,914,971	29,829,878	24,784,947	26,544,608	23,661,133	22,693,126	291,915,583
Arizona	157,527,538	180,442,087	198,682,874	177,527,262	167,674,574	162,866,396	167,626,412	168,121,327	176,163,683	184,208,006	176,183,883	192,091,434	2,103,725,348
Arkansas	99,125,128	120,208,066	90,670,906	128,681,408	119,140,857	149,492,241	117,006,638	78,228,587	164,219,758	80,627,687	165,948,706	142,827,284	1,362,684,269
California	1,067,052,000	1,061,413,000	1,160,800,000	1,124,117,000	1,128,668,000	1,112,824,000	1,101,102,000	1,195,861,000	1,090,338,000	1,146,748,000	1,145,808,000	1,134,661,000	13,519,087,000
Connecticut	113,631,761	111,169,677	117,298,896	111,897,319	116,928,982	113,980,238	115,919,468	118,232,380	108,513,810	120,756,099	119,163,691	121,266,081	1,390,457,362
Delaware	28,402,614	26,192,008	28,822,436	29,966,940	31,890,241	31,819,604	33,417,394	33,987,210	29,481,674	30,799,065	29,428,411	29,761,185	361,156,987
Dist. of Col.	12,732,916	13,763,092	15,406,886	15,048,373	15,386,513	15,013,342	9,422,662	14,968,980	14,137,866	15,489,549	13,498,645	14,761,235	169,629,917
Florida	569,888,427	566,155,980	566,797,784	613,173,572	580,343,190	578,133,021	551,463,084	568,930,564	572,106,057	530,623,685	561,303,548	561,631,768	6,819,014,945
Georgia	331,261,126	322,470,822	361,801,945	354,446,345	372,840,043	357,278,844	370,368,962	371,739,408	358,573,082	362,274,426	368,068,632	388,273,306	4,384,116,940
Hawaii	34,056,536	29,479,429	38,073,038	34,046,156	29,199,988	34,213,080	34,523,338	41,635,995	33,417,302	38,311,440	33,090,010	39,812,480	409,868,702
Idaho	44,821,377	47,495,124	44,692,682	46,397,750	60,942,307	58,216,800	48,684,078	57,883,662	62,692,407	65,727,828	45,167,149	62,980,147	609,096,489
Illinois	383,051,413	363,149,434	392,237,575	430,688,218	402,310,180	403,860,119	398,419,519	411,921,025	388,154,355	411,567,730	402,196,669	400,244,152	4,787,930,339
Indiana	306,667,933	238,370,273	244,289,048	265,181,581	260,688,479	257,516,662	266,854,074	272,980,638	258,491,302	289,939,442	277,385,862	280,437,598	2,986,499,572
Iowa	114,641,091	110,837,163	118,536,398	125,830,070	125,467,669	126,305,949	139,412,768	138,797,738	116,612,169	132,984,063	123,335,661	126,178,849	1,539,998,588
Kansas	101,843,367	99,480,539	108,088,851	109,870,369	115,788,503	118,435,784	120,797,766	118,981,870	106,209,680	116,023,583	107,901,608	113,003,974	1,326,405,604
Kentucky	147,226,283	158,367,752	166,339,490	178,975,584	178,139,564	177,089,811	185,033,078	38,692,461	182,623,044	187,080,893	192,661,442	133,411,860	1,865,830,463
Louisiana	166,981,639	158,034,648	174,040,188	166,409,416	209,523,675	34,641,434	200,971,957	200,580,167	46,274,930	208,843,348	34,230,257	199,436,108	2,170,917,716
Maine	81,897,708	81,194,366	29,991,401	64,178,336	81,946,331	42,891,408	78,949,896	86,518,261	80,588,510	82,464,011	6,892,230	71,680,644	646,878,631
Maryland	157,723,882	163,783,188	183,377,042	189,602,075	189,446,002	189,102,130	198,077,366	195,321,033	178,026,258	193,090,029	186,276,611	184,671,100	2,203,698,686
Massachusetts	200,744,826	193,363,588	204,101,721	208,934,028	223,010,526	217,558,567	223,066,496	232,880,344	207,566,192	223,891,304	214,241,348	216,911,680	2,562,954,588
Michigan	373,158,412	341,900,879	349,533,995	386,320,301	413,239,678	402,137,991	421,971,825	435,982,988	390,794,071	419,717,168	397,343,857	397,343,858	4,739,008,023
Minnesota	186,717,122	178,780,768	187,058,868	177,089,494	208,428,981	204,146,167	211,111,573	220,978,225	194,535,746	200,242,137	193,691,789	197,944,528	2,360,705,076
Mississippi	119,326,111	103,273,827	116,578,149	130,408,073	70,748,530	177,470,883	143,006,923	126,942,464	113,843,563	119,984,366	116,486,678	130,407,322	1,466,426,889
Missouri	223,657,610	221,276,152	249,191,996	236,904,989	276,786,911	264,941,217	236,838,868	304,180,495	227,648,067	261,125,047	243,543,073	282,430,520	2,908,464,918
Montana	34,548,208	34,189,028	41,303,090	41,504,121	40,815,212	46,609,383	54,102,131	51,783,268	42,064,987	42,306,969	38,774,907	42,803,281	492,805,785
Nebraska	64,008,893	60,789,736	65,871,499	67,303,006	70,499,066	71,846,238	76,581,426	76,731,037	68,386,342	74,457,310	67,348,788	68,964,033	826,923,980
Nevada	61,708,622	60,240,289	66,301,680	66,489,524	68,392,273	68,734,891	72,897,458	74,168,641	67,056,733	70,911,387	64,289,118	66,463,872	807,616,188
New Hampshire	47,725,344	45,327,924	46,744,055	45,425,904	50,714,316	50,059,634	54,822,998	56,808,217	47,926,249	52,479,910	47,432,486	49,279,229	594,216,226
New Jersey	268,674,496	272,452,182	303,667,781	302,089,105	293,722,124	316,083,367	318,692,952	337,226,552	297,937,838	316,324,219	311,984,533	312,692,810	3,650,517,828
New Mexico	74,003,688	76,385,115	72,516,763	72,286,510	76,289,480	74,086,648	78,142,368	70,667,405	79,836,504	68,856,926	98,492,174	72,102,728	893,663,109
New York	484,750,261	434,381,834	460,579,100	433,358,503	512,547,860	486,870,007	486,017,932	502,670,698	454,680,484	466,399,891	483,376,363	541,079,627	5,625,912,560
North Carolina	278,985,011	272,310,990	317,359,844	316,018,386	332,512,943	315,198,282	337,263,341	341,498,192	309,283,639	332,982,645	316,383,715	318,641,101	3,788,642,889
North Dakota	26,434,215	26,619,289	29,451,387	30,006,037	31,809,128	33,989,292	36,459,926	38,939,966	31,667,684	32,866,546	31,313,580	29,482,888	374,639,873
Ohio	401,998,314	367,758,840	396,698,082	421,783,345	429,982,321	422,472,934	442,275,809	443,066,466	386,466,836	427,915,013	414,188,241	422,382,563	4,992,791,869
Oklahoma	146,129,560	142,248,638	163,762,858	189,173,776	167,104,905	172,742,872	161,720,680	162,180,479	153,999,784	166,431,270	163,848,700	154,307,196	1,873,630,669
Oregon	111,857,106	101,861,994	133,774,626	121,826,220	122,317,927	134,788,700	141,607,214	128,478,851	143,030,341	140,017,187	108,928,704	148,249,889	1,498,436,429
Pennsylvania	348,139,918	364,166,696	392,926,382	402,162,644	426,160,989	428,793,563	438,867,708	442,276,667	393,666,875	426,111,614	410,316,480	407,421,767	4,867,707,283
Rhode Island	31,140,848	31,140,848	31,140,850	32,171,703	32,171,703	32,171,708	33,011,607	33,011,607	33,011,608	33,065,473	33,065,473	33,065,474	398,168,897
South Carolina	149,093,327	149,383,858	168,155,470	152,822,519	166,059,114	177,482,178	182,530,684	181,506,732	162,167,306	186,362,368	167,986,101	170,649,665	2,014,199,312
South Dakota	28,891,819	29,076,570	31,224,577	34,349,748	37,430,319	40,940,153	46,522,561	46,040,578	35,098,330	39,589,647	34,556,127	32,795,220	436,715,619
Tennessee	229,799,299	186,750,387	232,753,469	231,457,999	235,505,925	245,621,289	257,714,217	243,953,789	224,892,178	222,592,988	239,702,627	235,985,450	2,786,729,367
Texas	780,668,962	762,620,428	832,281,219	816,144,432	867,457,878	810,832,034	853,410,326	848,869,296	791,991,484	836,372,139	808,286,064	833,864,922	9,833,819,164
Utah	69,834,285	68,105,754	73,246,804	76,091,275	77,428,176	80,817,737	84,226,832	86,925,207	76,201,096	81,458,566	73,198,713	76,301,637	973,791,080
Vermont	36,139,797	32,674,248	29,085,414	23,998,066	28,485,183	23,835,279	29,904,216	31,530,042	28,986,529	28,351,437	25,416,614	23,208,845	314,035,869
Virginia	233,282,102	233,329,263	267,591,618	279,366,301	282,557,721	299,479,088	336,623,542	293,721,609	269,507,858	310,491,586	272,356,616	278,714,644	3,346,426,972
Washington	191,804,564	212,192,402	230,072,636	221,364,810	222,013,136	227,000,773	235,922,189	239,890,734	222,527,850	222,776,515	212,806,178	202,286,758	2,689,962,232
West Virginia	51,158,686	58,005,184	64,713,325	68,039,463	61,988,985	75,844,008	74,391,386	66,281,770	79,148,220	69,009,588	62,384,683	76,149,163	809,124,481
Wisconsin	186,793,043	178,826,815	188,169,930	187,992,745	215,632,870	202,685,628	238,477,008	233,901,749	194,703,231	210,894,930	201,112,082	200,637,808	2,427,031,854
Wyoming	28,109,131	24,615,826	22,085,979	21,967,660	24,263,377	23,967,833	30,162,723	29,447,821	41,448,863	42,215,548	28,340,949	28,003,636	344,816,346
U.S. Total	9,889,166,075	9,408,640,980	10,103,252,337	10,222,172,842	10,726,807,102	10,409,415,682	11,002,247,142	10,995,179,549	9,980,386,098	10,664,086,356	10,199,418,346	10,822,397,142	123,662,287,497
Puerto Rico	87,376,616	111,627,983	82,381,091	70,703,928	93,684,919	97,205,448	80,380,794	94,431,386	67,106,998	101,746,694	81,377,444	94,416,087	1,062,408,988
Grand Total	9,646,742,691	9,520,268,963	10,185,633,428	10,293,076,770	10,819,492,021	10,506,621,130	11,082,627,936	11,089,610,935	10,047,493,096	10,765,833,050	10,280,795,789	10,916,813,229	124,724,889,438

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MONTHLY GASOLINE REPORTED BY STATES - 1997[1]

COMPILED FOR THE CALENDAR YEAR
FROM STATE FUEL-TAX REPORTS

(GALLONS)

TABLE MF 33GA
APRIL 1998

STATE	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
Alabama	163,726,918	176,623,408	198,635,119	201,332,164	206,766,198	193,808,621	213,109,601	204,489,652	193,966,637	206,105,795	184,896,646	208,618,582	2,367,880,361
Alaska	20,858,408	18,028,714	21,286,632	20,945,179	26,164,948	28,688,031	24,826,289	-	-	-	-	-	160,779,171
Arizona	164,616,123	159,380,346	184,376,342	181,836,112	179,826,394	167,023,391	176,456,438	176,889,222	164,371,623	181,813,398	176,124,306	-	1,892,272,827
Arkansas	114,428,230	104,348,240	112,662,886	121,943,879	122,664,452	120,050,430	128,452,614	124,738,244	113,783,822	34,953,942	201,764,793	116,619,810	1,436,389,081
California	1,074,089,020	1,004,138,080	1,139,539,030	1,133,610,000	1,226,380,000	1,257,408,000	1,281,932,000	1,199,902,000	1,126,023,000	1,183,674,000	1,004,919,000	1,171,136,000	13,722,730,000
Colorado	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Connecticut	119,813,904	108,481,892	126,919,686	126,978,602	127,316,085	122,810,348	128,767,280	123,348,962	120,026,017	-	-	-	1,104,461,826
Delaware	27,991,392	26,211,892	29,101,265	29,842,618	29,266,509	12,096,976	33,302,963	28,207,403	31,184,939	32,089,823	28,722,336	32,473,883	367,370,529
Dist. of Col.	14,012,913	12,774,978	14,923,316	14,724,083	16,300,309	15,043,661	16,486,228	14,781,406	14,025,398	14,983,057	14,368,386	14,179,167	175,849,421
Florida	577,866,572	574,873,604	657,089,573	630,069,361	585,767,883	589,607,546	589,796,903	584,961,269	583,263,064	644,360,206	582,138,467	560,592,988	6,979,012,436
Georgia	269,820,804	326,598,745	370,161,214	367,150,420	355,566,806	366,602,216	380,900,088	377,279,327	355,419,782	372,566,617	357,834,717	-	3,996,920,975
Hawaii	32,388,843	32,090,632	35,118,390	36,839,282	34,991,273	33,977,485	35,019,021	35,527,647	33,578,021	34,616,332	32,909,361	34,806,316	406,277,280
Idaho	63,921,628	67,807,881	76,227,703	68,681,844	61,024,922	64,772,406	57,152,934	57,891,706	70,765,854	69,270,896	-	-	656,521,263
Illinois	386,169,809	346,472,761	422,563,039	419,708,751	410,089,477	411,208,175	416,250,886	397,186,986	426,880,236	410,083,605	397,666,282	413,902,916	4,856,032,428
Indiana	229,408,624	217,062,497	274,061,066	280,320,308	264,780,967	263,136,123	267,131,792	269,703,789	248,004,060	263,496,340	240,904,096	-	2,725,006,875
Iowa	117,397,820	115,834,863	120,862,360	126,853,822	126,008,453	130,326,902	140,991,713	122,808,777	120,462,771	140,161,388	120,631,888	-	1,428,026,057
Kansas	107,392,026	96,894,961	113,536,669	112,673,615	117,971,191	119,309,623	125,022,916	121,566,190	119,141,599	114,789,684	62,930,084	-	1,210,948,398
Kentucky	7,650,627	149,815,867	177,838,977	175,789,726	244,859,726	178,260,109	178,365,044	174,343,826	189,701,300	113,136,853	226,706,387	163,082,630	1,999,680,699
Louisiana	148,366,890	151,405,622	81,622,863	172,875,531	182,774,853	162,633,099	168,321,663	192,116,580	163,948,135	171,308,798	181,648,167	332,370,890	1,998,993,220
Maine	35,922,116	90,522,880	35,291,613	67,358,301	90,370,873	66,026,644	70,091,217	-	-	-	-	-	398,562,616
Maryland	163,022,826	167,208,266	187,242,721	186,465,285	198,213,784	184,679,806	203,661,066	197,333,423	179,807,007	198,730,799	184,942,874	190,699,694	2,248,044,080
Massachusetts	208,287,378	189,948,937	212,853,662	206,275,441	234,947,376	224,071,306	232,395,943	232,644,086	-	-	-	-	1,731,624,089
Michigan	383,698,466	368,283,616	344,756,819	367,912,286	417,133,916	404,312,216	451,866,499	1,393,096	4,383,604	1,188,633,746	392,383,773	417,909,331	4,819,021,301
Minnesota	163,639,678	130,662,103	183,238,573	188,570,863	208,167,866	206,892,040	227,705,661	213,864,096	198,856,799	218,098,722	189,334,967	332,880,731	2,389,103,728
Mississippi	108,021,875	117,159,419	126,626,325	115,579,540	146,412,462	121,970,305	151,608,717	119,073,151	140,758,217	128,897,830	84,844,461	-	1,365,964,092
Missouri	231,397,863	217,731,454,521	243,862,800	262,949,683	276,860,363	262,902,726	276,449,881	267,362,947	248,427,489	258,167,448	253,159,905	288,466,861	3,008,079,306
Montana	33,662,892	30,735,188	36,990,900	36,844,948	43,064,854	44,814,911	52,880,661	52,723,008	42,612,899	-	-	-	372,330,863
Nebraska	66,004,545	67,705,180	68,523,454	67,152,256	73,289,733	72,678,046	83,794,380	78,603,886	70,130,481	74,889,274	67,714,263	80,580,099	844,082,429
Nevada	64,363,081	62,024,323	70,835,396	71,024,886	72,933,082	71,809,942	76,452,216	77,588,089	69,816,862	-	-	-	636,848,057
New Hampshire	49,199,434	44,427,851	49,006,896	47,366,680	51,732,466	52,609,893	69,969,110	89,777,644	62,977,965	66,417,296	49,744,702	53,603,389	636,537,486
New Jersey	312,302,190	271,416,467	309,303,886	310,295,610	319,951,771	310,326,886	324,315,190	326,980,619	316,363,571	331,996,734	310,689,380	326,780,314	3,770,682,808
New Mexico	63,693,117	67,180,157	74,020,576	72,157,863	68,369,283	69,969,110	66,341,084	87,748,542	81,348,986	80,781,724	127,997,093	180,178,893	994,803,378
New York	418,653,871	413,463,100	475,530,799	428,454,349	479,722,146	600,825,583	492,457,732	474,676,926	511,547,283	484,991,118	-	-	4,677,531,667
North Carolina	311,631,833	281,895,097	325,401,167	323,870,681	341,846,132	317,677,057	348,463,127	344,573,797	320,139,383	341,846,344	309,902,602	336,495,080	3,903,817,300
North Dakota	26,461,481	22,954,080	26,188,733	25,676,383	33,850,887	36,879,454	37,610,439	32,669,036	28,886,298	30,906,266	29,210,263	268,347,227	
Ohio	398,314,815	363,109,276	418,337,343	418,304,516	444,644,876	438,966,881	504,947,402	493,644,172	465,751,367	487,722,849	451,152,978	473,880,380	5,358,488,783
Oklahoma	132,314,900	129,866,089	149,364,346	160,284,232	162,126,483	157,300,769	168,488,811	156,922,861	146,121,132	736,988,863	186,783,209	-	1,780,363,635
Oregon	108,717,775	126,815,146	117,496,012	117,517,451	135,730,707	130,377,075	131,673,768	145,977,479	131,604,156	116,316,362	34,043,836	122,148,071	1,468,042,638
Pennsylvania	388,798,660	352,342,011	398,454,058	404,043,459	415,361,032	399,908,018	417,660,726	421,084,426	398,303,893	402,142,125	393,727,018	416,448,146	4,704,715,571
Rhode Island	31,461,516	31,461,516	31,461,517	33,167,678	33,167,678	33,167,678	33,637,204	33,637,204	33,637,204	-	-	-	294,739,197
South Carolina	161,747,708	154,697,239	178,230,469	175,317,221	181,856,636	175,070,788	188,974,804	186,282,081	170,344,638	180,218,067	168,931,195	178,541,644	2,100,202,490
South Dakota	29,412,343	27,513,943	31,808,789	27,962,421	28,073,601	40,478,340	45,992,306	44,806,210	37,089,184	39,712,066	33,868,989	34,367,701	437,148,663
Tennessee	224,382,137	201,866,961	227,382,316	236,679,367	242,897,383	263,432,716	284,434,140	281,448,136	238,706,130	242,434,051	232,468,784	240,908,016	2,844,739,135
Texas	786,845,447	734,864,669	837,406,882	813,248,308	863,730,884	840,457,732	879,709,420	777,682,678	698,499,891	843,436,081	751,475,980	826,138,488	9,570,443,331
Utah	73,393,151	68,603,909	75,764,972	78,856,608	88,482,694	84,163,218	86,667,727	87,697,116	78,810,730	84,644,634	72,986,102	80,373,773	959,544,143
Vermont	27,137,565	24,609,161	23,612,019	23,927,669	28,926,884	27,403,576	31,363,952	29,686,228	27,376,022	29,776,309	24,473,974	27,798,084	326,086,373
Virginia	290,701,007	234,757,826	266,577,666	258,569,896	273,883,111	304,429,578	291,861,898	316,172,751	286,465,609	291,352,983	283,730,046	339,548,376	3,485,451,867
Washington	199,709,027	156,908,919	244,926,142	218,089,460	238,589,380	234,820,606	237,201,766	218,199,933	233,706,468	219,648,508	211,287,462	214,766,529	2,608,439,090
West Virginia	66,568,625	58,993,366	70,034,528	69,417,337	89,587,974	82,189,854	73,610,819	75,194,086	66,709,392	65,729,822	-	-	697,535,972
Wisconsin	184,675,071	170,077,175	189,783,782	184,258,425	212,898,116	206,315,689	233,130,041	219,667,093	201,331,028	218,615,386	186,549,115	198,831,187	2,404,817,898
Wyoming	12,491,265	28,561,236	28,631,702	20,396,031	27,091,278	27,091,278	21,988,999	28,924,626	26,362,740	69,856,695	28,326,166	28,704,901	328,615,089
U.S. Total	9,825,630,767	9,227,891,198	10,173,082,964	10,498,714,626	10,923,361,396	10,839,521,665	11,141,349,327	10,433,681,910	9,704,643,569	11,882,929,898	8,962,809,749	9,316,383,298	120,652,249,569
Puerto Rico	87,576,616	111,627,984	82,181,091	70,703,928	93,684,919	97,205,448	80,360,794	94,431,386	67,106,898	101,746,694	81,377,444	94,414,087	1,062,408,988
Grand Total	9,663,207,383	9,339,519,181	10,255,264,055	10,569,418,754	11,017,246,315	10,936,727,113	11,221,700,116	10,528,113,296	9,771,750,467	10,984,676,592	9,044,187,193	9,410,797,385	121,752,864,267

1/ This table shows gross volume of gasoline reported by wholesale distributors in each State. The data are taken from State taxation reports and may reflect time lags of 6 weeks or more between the wholesale and retail levels. The data include highway use, nonhighway use, and losses.

EPNEST J. ISTOOK, JR.
5TH DISTRICT, OKLAHOMA

COMMITTEE:
APPROPRIATIONS
SUBCOMMITTEES:
TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT
VICE CHAIRMAN,
LABOR, HHS, AND EDUCATION
NATIONAL SECURITY

AT LARGE WHIP
REPUBLICAN POLICY COMMITTEE

Attachment 4

Congress of the United States
House of Representatives
Washington, DC 20515–3605

119 CANNON BUILDING
WASHINGTON, DC 20515–3605
(202) 225–2132
FAX (202) 226–1463

DISTRICT OFFICES:
5400 N. GRAND BOULEVARD
SUITE 505
OKLAHOMA CITY, OK 73112
(405) 942–3636
FAX (405) 842–3782

FIRST COURT PLACE
SUITE 206
BARTLESVILLE, OK 74003
(918) 336–0848
FAX (918) 336–5748

5TH & GRAND
PONCA CITY, OK 74601
(405) 762–6776
FAX (405) 762–7049

ISTOOK@HR.HOUSE.GOV

January 30, 1998

Commissioner Micheal Urbach
State Dept of Taxation and Finance
W.A. Harriman Campus
Albany, NY 12227

Dear Commissioner Urbach:

In anticipation of legislation introduced in Congress, I am requesting information on tax issues states are encountering with Federally recognized Indian tribes. Specifically, I am interested in the tax agreements states have with tribes on retail sales and excise taxes on sales to non-Indians occurring on Indian lands.

This information will greatly assist me in examining Native American tax issues, in addition to understanding how individual states regulate and levy taxable goods on Native American Reservations.

If you could please take time out to answer these particular questions, it would be most appreciated. I request a response by May 1, 1998. If you have any questions, please call John Albaugh, of my staff, at (202) 225-2132. Thank you in advance for your consideration.

Very Truly Yours,

Ernest J. Istook, Jr.
Member of Congress

1. What exemptions, if any, does your state allow Native Americans businesses?

2. Is the exemption(s) listed above listed in the number 1 specific statutory language?
____Yes ___ No

If yes, please provide a statutory site.

If no, what authority do you use?

3. At what point is motor/diesel fuel taxed in your state?

	Gasoline/Diesel
Receipt by supplier___	Sale by supplier___
Distributor___	Distributor___
Wholesaler___	Wholesaler___
Retailer____	Retailer____
User___	User___
Other____	Other___

4. Is the one identified in question 3 considered the taxpayer, or are they an agent of the state, collecting taxes from the end user of the state behalf?

5. Do you have any agreements with any tribes related to taxes on motor fuel?
___Yes ___No

If yes, briefly describe, your arrangements. Do you have an motor fuel tax agreement with each tribe in your state? If no, why not?

6. Do you have any agreements with any tribes related to taxes on tobacco ?
___Yes ___No

If yes, briefly describe your arrangements. Do you have an agreement with each tribe in your state? If no, why not?

7. Have you or do you currently have litigation issues? If so, please provide a brief description.

8. If your state does not have tax agreements with Indian tribes and is losing tax revenue due to the sale of non-taxed items to non-Indians, what is the amount of this tax loss?

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, DC 20226

DIRECTOR

Attachment 3

MAY 29 1997

Honorable Ernest J. Istook, Jr.
U.S. House of Representatives
Washington, DC 20515-3605

Dear Mr. Istook:

This is in response to your letter dated April 15, 1997, concerning the evasion of cigarette taxes on Indian lands in Oklahoma and the national ramifications of this problem. You have asked us to respond to a series of questions regarding the Bureau of Alcohol, Tobacco and Firearms' (ATF) investigations into the loss of State revenue due to contraband cigarette sales.

By way of background, Congress has determined that extensive trafficking in cigarettes to defeat State excise taxes constitutes a significant problem affecting interstate and foreign commerce. Congress recognized that primary responsibility for cigarette tax enforcement lies at the State level, but concluded that the Nation would benefit from Federal assistance concentrated in those areas beyond the jurisdictional and resource capabilities of State agencies. On October 25, 1978, Congress passed Pub. L. No. 95-575, and the law was enacted on November 2, 1978. This statute made trafficking in contraband cigarettes a violation of Federal law, and authorized the Secretary of the Treasury to prescribe rules and regulations to implement the provisions of the law.

The Contraband Cigarette Trafficking Act (CCTA) (18 U.S.C. §§ 2341 -2346) makes it unlawful for any person to ship, transport, receive, possess, sell, distribute, or purchase in excess of 60,000 cigarettes (5 cases) which bear no evidence of State tax payment in the State in which cigarettes are found, if such State requires indicia of payment of such State taxes. Violations of the CCTA are punishable by a monetary fine, imprisonment of not more than 5 years, or both.

CCTA violations could, depending on the specific circumstances of each case, serve as the basis for prosecutions under the wire fraud (18 U.S.C. § 1343), mail fraud (18 U.S.C. § 1341), money laundering (18 U.S.C. § 1956), and The Racketeering Influenced and Corrupt Organization Act (18 U.S.C. § 1962) statutes.

In response to your specific questions, we can provide the following information.

1. What is the estimated tax loss to the State of Oklahoma due to the evasion of cigarette taxes on Indian land?

Based on our ongoing investigations, we estimate that the State of Oklahoma has lost an estimated $27 million annually in revenue.

2. What amount has ATF expended, in both man hours and dollars, to investigate this problem?

In the past 6 months, ATF has expended more than $150,000 in investigative costs associated with potential Oklahoma CCTA violations. This includes personnel time and other types of expenditures.

3. What is the estimated amount of tax loss nationally due to the evasion of State cigarette taxes on Indian lands?

In response to your inquiry, our Wine, Beer and Spirits Regulation Branch conducted a telephone survey of State Tax Administrators in 28 States. For those States where statistics were available, reported annual losses in revenue ranged from between $30-50 million in California to $129,000 in South Dakota. New York and Washington reported an annual loss of $65 and $63 million, respectively, and Michigan reported an annual loss of $75 million. Twenty-four States were unable to provide an estimate of revenue lost due to the evasion of cigarette taxes. However, all indicated this is a large scale problem that cannot be controlled at the State level.

4. What amount would ATF require, in both man hours and dollars, to investigate this problem nationwide?

ATF has identified the following additional States where CCTA violations are occurring and where investigations will be conducted: Washington, North Carolina, Louisiana, Michigan, New York, Arizona, and New Mexico. It is estimated that the investigations in Oklahoma and Kansas will cost $2 million to complete. Overall, we project that all these investigations will cost approximately $8 million in salaries, travel, per diem, and miscellaneous expenses such as equipment, State and local overtime pay, transcripts, and purchase of supplies.

5. Please provide information about all diversion cases ATF has investigated, over the past two years (1995 and 1996), in which an Indian tribe was involved.

ATF is involved in 60 ongoing CCTA investigations. Of this number, 25 indicate the involvement of Native Americans. One of these cases, United States v. Baker, 63 F.3d 1478 (9th Cir. 1995), resulted in CCTA convictions involving an excess of one million dollars in fines and forfeitures. However, we cannot provide specific information concerning ongoing criminal investigations.

Please be assured that we are actively pursuing all possible leads and have implemented several investigative strategies to assist us in attempting to eradicate this problem in Oklahoma and other affected States.

Sincerely yours,

for John W. Magaw
Director

Statement
of
Congressman Ray LaHood (R-IL)

on the Collection of Motor Fuel Taxes
on Native American Lands

Senate Committee on Indian Affairs

March 11, 1998

Thank you, Mr. Chairman, for allowing me this opportunity to testify before your Committee. It is truly a privilege and an honor to be here today.

I have come here to speak about an issue that, I believe, is very important to our Native American tribes, our states, and to our transportation policy: the collection of motor fuel taxes on Native American lands. As a member of the House Transportation and Infrastructure Committee, I know first-hand how important the gas tax is to the maintenance and construction of our vast infrastructure system.

The gas tax, as I am sure you are aware, directly supports the efforts of state and federal governments in building and repairing our nation's roads and bridges. And, in order for our states to play their role in the transportation system, they need to be sure that they are collecting all of their motor fuel taxes. Unfortunately, that is not currently the case.

Currently, some Native American tribes do not always collect and remit gas tax receipts to the appropriate state government. This practice has cost the states a significant amount of revenue that could have been used to improve roads and bridges. Lost revenue estimates for some states are in the millions. It is estimated that Oklahoma, alone, lost roughly $13 million in motor fuel tax receipts for FY'96. Many other states are also adversely affected, including: Washington State, Oregon, Idaho, New Mexico, Kansas, Michigan and New York. I believe this problem of unremitted and uncollected gas taxes should be addressed, and I plan to offer a bill shortly that will address this problem.

My plan would prohibit the Secretary of Transportation from allocating funds for public lands highways on Indian lands and reservations unless either (a) the Indian tribe has entered into a written agreement with the state in which the highway is located that

provides procedures for the payment and collection of motor fuel taxes that are sold to a non-Native American by a retail establishment that is located on such land, or (b) the Indian tribe refuses to enter into a written agreement and/but the allocation of the funds is essential to the construction or maintenance of a highway or road that is a critical component of the National Highway System. These provisions would take effect 6 months after the date of enactment of such plan in order to allow the tribes and the states some time to negotiate compact agreements.

I do want to stress that the aim of this plan is to ensure that non-Native Americans pay and are assessed the gas tax. This plan is not intended to infringe on tribal sovereignty, rather, it is meant to encourage the tribes to work cooperatively with the states in order to formulate a mutually-agreeable compact on the subject of motor fuel taxation.

I am firmly convinced that this approach would yield numerous benefits. First, it would help ensure that states have adequate funds for road maintenance and construction. Second, it would end an inherent unfairness posed by the sale of tax-free fuel on Native American lands. And, third, it would preserve jobs and keep businesses open. The current situation heavily impacts petroleum retailers. Many purchasers of motor fuel, both gasoline and diesel, are likely to travel to Indian lands, because they know they can avoid paying state motor fuel taxes. And, the motive to do this can be great for many drivers. In fact, in some states, the tax on gasoline can be as high as 34 cents per gallon and 28 cents per gallon for diesel.

The sale of tax-free fuel poses serious concerns for retailers who must pay the tax and who are located within a reasonable distance of the Indian reservation, because the Native American retail establishments, by selling gas at a lower price (i.e., without the tax) have the potential to put countless numbers of establishments out of business. For example, avoiding the tax on diesel fuel for a typical truck with a 250 gallon tank could mean savings of $70--a sufficiently large amount to justify a trucker traveling to Native American lands to refuel his or her truck. At the very least, a trucker could plan or time his or her routes to ensure that they purchase tax-free fuel on Native American lands.

I believe these arguments, because of their impact on road maintenance and construction and on the highway trust funds, more than justify the scrutiny by this committee into this matter. I am eager to work with the Committee on this issue. I appreciate, Mr. Chairman, your allowing me to raise this issue today. Thank you.

STATEMENT OF DERRIL B. JORDAN
ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING TRIBAL SOVEREIGN IMMUNITY

MARCH 11, 1998

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the principle of tribal sovereign immunity and the important role it plays in helping to preserve tribal governments as viable members of the family of sovereigns recognized by the Constitution and federal law.

The United States has recognized the sovereignty of Indian tribes from the very beginning of the Republic. There are presently over 500 federally acknowledged tribes within the borders of the United States. Congress recently expressly affirmed the sovereign status of tribes in the 1994 "Federally Recognized Indian Tribe List Act," stating, "the United States has a trust responsibility to recognized Indian tribes . . . and recognizes the sovereignty of those tribes." In the Act, Congress validated the authority of the Secretary of the Interior to maintain a list of acknowledged tribes. In publishing this list, the Secretary has consistently indicated that listed tribes possess "...immunities and privileges...by virtue of their government-to-government relationship with the United States..." 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. § 83.2 (1996). Regardless of their size, whether in terms of members or territory, or the form of their organization, all federally recognized tribes enjoy the same basic responsibilities, powers, limitations and obligations.

As Senator Inouye noted in his comments during the Committee's hearing on this same issue in September of 1996, one of the attributes of sovereignty is immunity from suit if a tribe has not consented to the action. Senator Inouye further noted that Alexander Hamilton acknowledged this basic attribute of sovereignty in Federalist No. 81. Moreover, case law supports tribal sovereignty, as well. (See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," citing Turner v. United States, 248 U.S. 354, 358 (1919) and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940), and others.) In American Indian Agriculture Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (1985), the Eighth Circuit noted, "Indian tribes enjoy immunity because they are sovereigns predating the Constitution" (citations omitted). (See also Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172-73 (1977)). Most recently, the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991), stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." 498 U.S. at 510 (citations omitted).

The Supreme Court concluded that, "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." Id. Thus, Indian tribal sovereign immunity retains its full vitality.

The question now is whether Congress should act in a way that would eliminate or diminish the vitality that tribal sovereign immunity has long enjoyed in Congress and before the various courts of our Nation. The Administration's answer to that question is no.

Although we are aware of no comprehensive study detailing the degree to which federal and state governments and tribes have waived their sovereign immunity, we believe it is likely that recent proposals to abrogate tribal sovereign immunity have been based on the erroneous assumption that tribal governments are the only governments in our country that exercise the full scope of their immunity. We believe this assumption is erroneous because it underestimates the frequency with which federal and state governments raise sovereign immunity as a defense to lawsuits, while at the same time overestimating the frequency and nature of instances in which tribal sovereign immunity is invoked. Tribes frequently waive their immunity through tribal codes and statutes, water rights agreements, business contracts, insurance riders and economic development-oriented subordinate entities. Moreover, even if a comprehensive review of sovereign immunity was undertaken which showed differences in the frequently and nature of the exercise of this right by federal and state governments as compared to tribes, such a showing would not provide a sufficient basis for unilaterally eliminating tribal sovereign immunity. In order to understand more fully why tribes exercise sovereign immunity, one must understand the environment within which tribal governments exist and operate.

Tribal sovereign immunity serves an important purpose in protecting and promoting Indian tribal self-government. The Supreme Court has recognized that "the common-law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-government" (citations omitted). Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986). Similarly, in Oklahoma Tax Comm'n v. Citizen Band Potowatomi of Oklahoma, 498 U.S. at 510, the Court explained that Congress "has consistently reiterated its approval of the immunity doctrine," reflecting its desire to promote its "goal of Indian self-government, including its 'over-riding goal' of encouraging sufficiency and economic development" (citations omitted). Moreover, as the court noted in Martinez, 436 U.S. at 64-65, a finding that Congress waived tribal immunity in federal courts "would also impose serious financial burdens on already 'financially' disadvantaged tribes" (citation omitted).

The lower federal courts have recognized this principle as well. In American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F. 2d 1374, 1378 (8th Cir. 1985), the court pointed out that "immunity is thought necessary to promote the federal policies of tribal self-determination, economic development and cultural autonomy." In Maryland Casualty Co. V. Citizens Nat'l Bank of West Hollywood, 361 F.2d 517, 521-22 (5th Cir. 1966), the court found that tribal sovereign immunity is necessary to protect tribal assets from claims and judgments that would soon deplete tribal resources.

Tribal courts have also recognized the importance of sovereign immunity. (See Rowland v. Hoopa Valley Tribe, 21 Indian L. Rep. 6087, 6088 (Hoopa Valley Ct. App., Sept. 29, (1992) "[t]he purpose of sovereign immunity is to preserve the autonomous political existence of the tribes and tribal assets"; and Guardipee v. Confederated Tribes of the Grand Ronde Community of Oregon, 19 Indian L. Rep. 6111 (Gr. Ronde Tr. Ct., 1992) citing Maryland Casualty Co. "tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources").

In Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113, S. Ct. 684, 687 (1993), the Court recognized that one of the primary benefits of sovereign immunity is the right not to be sued, including the right to avoid the costs and general consequences associated with discovery and trial. The need to avoid such costs is just as important to tribal governments as it is to the federal government and states. Given the tenuous financial condition of most tribal governments, it is likely much more important to tribes.

This Committee is keenly aware of the conditions that exist on most reservations. Tribal infrastructures for roads, community water and sewer services and other amenities that most non-Indian communities take for granted are either absent or woefully inadequate. Health conditions are generally poor, and suicide, alcoholism and unemployment rates on most reservations are far above those in the rest of our Nation. Whatever the source of tribal revenues, the needs of the overwhelming number of tribal communities far exceed the available financial resources. Moreover, tribal governments do not have the same ability to raise revenue as the federal government or the states. Given the disparity between needs and resources, it is unreasonable for Congress to expect that the tribal exercise of sovereign immunity will be similar to or coextensive with the exercise of sovereign immunity by federal or state governments. As the case law cited in this testimony acknowledges, tribal sovereign immunity is an important corollary to tribal self-government. Without sovereign immunity, the assets of many tribal governments would soon be depleted to the point where meaningful self-government would be untenable.

In any discussion of tribal sovereign immunity in which the exercise of this right is compared to that of states it is important to note that states are afforded the opportunity to waive their own immunity in accordance with their own limited terms. While Congress has abrogated states' sovereign immunity in certain limited circumstances, by contrast, Congress has in recent years considered unilaterally providing broad, unlimited waivers of tribal sovereign immunity in the

courts of other sovereigns, principally federal and state courts. Proponents of these measures argue that tribal courts are biased against non-tribal litigants. Arguments alleging bias against non-tribal litigants in tribal courts are usually based on anecdotal evidence which is often inconclusive or not probative. Another argument often used to support waiving tribal immunity is that tribes can then be sued in state and federal courts, the only forum believed to be neutral. This argument fails to consider that state courts, in particular, may be biased against tribes. Congress has historically recognized that states should not have judicial authority over Indian tribes. The phenomenon of inhospitable and unfair treatment of Indians by states is not new, as the Supreme Court noted over a hundred years ago when it stated, "[Tribes] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886).

While tribes have been somewhat more willing to have their disputes resolved in federal courts than in state courts, the resolution of civil disputes arising on the reservation often requires the application and interpretation of tribal laws, customs and traditions. Often federal courts are not well suited to interpret tribal laws. (Cf. Martinez, 436 U.S. at 71, wherein the Supreme Court recognized that resolution of many civil disputes arising under 25 U.S.C. §1302 of the Indian Civil Rights Act will depend upon questions of tribal tradition and custom which tribal forums are likely to be better able to evaluate than federal courts.)

With regard to tax disputes between tribes and states, the Administration believes that it is inappropriate for Congress to waive tribal sovereign immunity at a time when the Supreme Court has been confirming the sovereign immunity of states in suits brought by tribes. (See Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S. CT. 2028 (1997). Tribe's claim against Idaho officials alleging ownership of bed, banks and submerged lands of all navigable waterways within boundaries of the Reservation, including Lake Coeur d'Alene, did not fall under Ex parte Young exception and was therefore barred by the Eleventh Amendment; (Seminole Tribe of Florida v. Florida, 517 U.S. ___, 116 S. Ct. 1416 (1996). Congress lacks authority under the Indian Commerce Clause of the United States Constitution to waive Eleventh Amendment immunity of States with regard to suits brought by Tribes under the Indian Gaming Regulatory Act; and (Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). 28 U.S.C. §1362 granting jurisdiction to federal district courts to hear "all civil actions brought by any Indian tribe" does not constitute a waiver of Alaska's Eleventh Amendment immunity to suit.)

It would be fundamentally unfair to expose tribes to suits by state governments when tribes are unable to sue states. Currently both tribes and states are immune to suit. This mutual immunity to suit encourages tribes and states to deal with each other as sovereigns and often results in government-to-government negotiations between tribes and states on tax and other issues of mutual concern. Neither party has the upper hand in such negotiations. Rather, each sovereign must respect the views and needs of the other and both must work toward mutually satisfactory accommodations on important issues. Waiving tribal sovereign immunity would effectively remove the incentive of states to deal with tribes as fellow sovereigns.

Widespread disagreement exists among officials within state governmental officials exists as to whether it is necessary to waive tribal sovereign immunity in order to resolve tribal state disputes. In a letter dated September 10, 1997, Governor Gary Locke of Washington expressed his concerns to Senator Slade Gorton concerning Sections 118 and 120 of the Department of the Interior's Fiscal 1998 Appropriations Bill, (H.R. 2107). If enacted, Section 118 would have effected a waiver of tribal sovereign immunity upon receipt of TPA funds and Section 120 would have provided for means testing of tribal TPA allocations. Governor Locke stated in his letter that, in his view, those provisions would "undoubtedly weaken the political, social and economic infrastructure needed to ensure healthy, stable tribal communities." He concluded by stating that he believed that the provisions "would negatively impact all of Washington's citizens, as well as tribes and communities throughout the country." Similarly, the attorneys general of eight states, in a letter to President Clinton dated September 3, 1997 regarding Sections 118 and 120 of H.R. 2107, stated that those provisions "would drive a wedge into the heart of the doctrine of tribal sovereignty which has protected native cultures and native rights and has served as the foundation of Indian self-government in this country."

Regarding contractual disputes, the Administration's view is that there is no need for Congress to waive tribal sovereign immunity. A non-Indian party entering into a contractual relationship with an Indian tribe has the opportunity to negotiate and bargain for a waiver of immunity from the tribe or the subordinate entity that will enter into the contract for the tribe. There are many federal, tribal and state court cases recognizing and applying the doctrine of tribal sovereign immunity. Any party seeking to do business with a tribe has ample notice of the doctrine and ample opportunity to negotiate a waiver to protect its interests. The concept of *caveat emptor* should prevail in these circumstances.

We direct to Committee's attention to the 1991 Report of the United States Commission on Civil Rights. After extensive hearings, the Commission rejected the call for a waiver of tribal sovereign immunity and instead recommended that before waiving tribal immunity, "Congress should afford tribal forums the opportunity to operate with adequate resources, training and funding, and guidance, something that they have lacked since the inception of the ICRA."

In conclusion, it is the Administration's view that there is no documented need for Congress to waive unilaterally tribal sovereign immunity. Such a sweeping curtailment of tribal sovereignty would be reminiscent of the Termination Era.

I am pleased to have had the opportunity to present the views of the Department of the Interior on this subject and I will be happy to answer questions of the Committee.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MAY 19 1998

Honorable Ben Nighthorse Campbell
Chairman
United States Senate
Committee on Indian Affairs
Washington, D.C. 20510

Dear Mr. Chairman:

It is my pleasure to provide answers to supplemental questions received following the Committee's March 11, 1998, hearing on tribal sovereign immunity.

Should you have any questions concerning the enclosed responses, please contact my office at (202) 208-3401.

Sincerely,

Derril B. Jordan
Associate Solicitor - Division of Indian Affairs

Enclosure

1. Does the federal government's trust obligation include the responsibility to protect tribal self-government?

Yes.

Protection of tribal self-government is an important aspect of the trust responsibility, broadly conceived, that the federal government has assumed. The United States has recognized Indian tribes as sovereign governments from the very inception of our Nation. See Worcester v. Georgia, 31 U.S. 515, 544-50 (1832) (discussing the history of tribal-colonial treaty making and the respect for tribal sovereignty demonstrated by colonial powers, and subsequently the United States itself beginning with the commencement of the Revolutionary War). The Court noted again that "Indian nations had always been considered as distinct, independent political communities". Id. at 558. See also F. Cohen, Handbook of Federal Indian Law 232 (1982 ed.) (hereinafter "Cohen") (European nations, and subsequently the United States, recognized the pre-existing sovereignty of Indian tribes).

In Worcester, the Court held that certain laws of the State of Georgia were unconstitutional. The purposes of the Georgia laws at issue included, among others, the extension of State laws into Cherokee country, the abolition of Cherokee laws and institutions, and the obliteration of the Cherokees as a distinct, politically independent self-governing people. Id. at 541. The Court held that these laws were unconstitutional because they interfered with the regulation of Indian affairs by the United States and because they were "in direct hostility with [several] treaties" between the United States and the Cherokee Nation which "recognize the pre-existing power of the nation to govern itself." Id. at 561.

Since the Court's decision in Worcester, the United States' responsibility to Indian tribes as domestic dependent nations has been understood to include the responsibility of protecting tribal self-government. See Cohen at 234 (pursuant to Worcester, the "United States has assumed a fiduciary obligation, insuring the tribes' continued integrity as self-governing entities within certain territory" and 361 (federal protection of tribal self-government is an important aspect of the trust relationship).

Indeed, Congress has legislated on the basis that protection of tribal self-government is an important aspect of the Federal trust responsibility. In declaring its policy when enacting the Indian Self-Determination and Education Assistance Act (ISDEAA), Congress stated that it "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination . . . ." 25 U.S.C. § 450a (a). As amended by Pub. L. 100-472, § 102, 25 U.S.C. § 450a (b) commits the United States "to supporting and assisting Indian tribes in the development of strong and stable tribal governments" as part of Congress' "commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes . . . through the establishment of a meaningful Indian self-determination policy . . . ."

More recently, Congress enacted the "Federally Recognized Indian Tribe List Act of 1994." Pub. L. 103-454, Title I (codified at 25 U.S.C. §§ 479a - 479a-1). Congress found that "the United

States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes and recognizes the sovereignty of those tribes". Subsection 103 (2). Subsection 103 (5) further states that "Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated".

The Act validates the authority of the Secretary to maintain a list of federally recognized tribes. In publishing this list, the Secretary has consistently indicated that listed tribes possess "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations and obligations of such tribes." 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. § 83.2 (1996).

One of the immunities that tribes, as members of the family of sovereigns in our Nation, have long been understood to enjoy is sovereign immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," citing Turner v. United States, 248 U.S. 354, 358 (1919) and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940), and others).

Tribal sovereign immunity serves an important purpose in protecting and promoting Indian tribal self-government. The Supreme Court has recognized that the sovereign immunity possessed by the tribe is a "necessary corollary to Indian sovereignty and self-government" (citations omitted). Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986). Similarly, in Oklahoma Tax Comm'n v. Citizen Band Potowatomi of Oklahoma, 498 U.S. at 510, the Court explained that Congress "has consistently reiterated its approval of the immunity doctrine," reflecting its desire to promote its "goal of Indian self-government, including its 'over-riding goal' of encouraging sufficiency and economic development" (citations omitted). Moreover, as the court noted in Martinez, 436 U.S. at 64-65, a finding that Congress waived tribal immunity in federal courts "would also impose serious financial burdens on already 'financially' disadvantaged tribes" (citation omitted).

The lower federal courts have recognized this principle as well. In American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F. 2d 1374, 1378 (8th Cir. 1985), the court pointed out that "immunity is thought necessary to promote the federal policies of tribal self-determination, economic development and cultural autonomy." In Maryland Casualty Co. V. Citizens Nat'l Bank of West Hollywood, 361 F.2d 517, 521-22 (5th Cir. 1966), the court found that tribal sovereign immunity is necessary to protect tribal assets from claims and judgments that would soon deplete tribal resources.

Given the critical importance of tribal sovereign immunity in preserving tribal self-government, the broad-based, unilateral waiver of tribal sovereign immunity that is contemplated by legislation such as S. 1691 would critically undermine tribal self-government. In practical terms, it may result in termination for a number of tribes, and would stand in stark contrast to Congress' declaration when enacting the Federally Recognized Indian Tribe List Act of 1994 that it "has

expressly repudiated the policy of terminating recognized Indian tribes". The preservation of tribal sovereign immunity is an important corollary to protecting tribal self-government. The unilateral waiver of tribal sovereign immunity, in both state and federal courts, that is contemplated by S. 1691, is inconsistent with the trust responsibility the United States has assumed to preserve tribal self-government.

2. Would a broad waiver of tribal immunity require the Department to participate in defending a wide range of new areas?

While it is difficult to predict with certainty, we would anticipate an increase in litigation.

Challenges to tribal sovereign authority are not usually limited to challenges to the methods or manner through which tribal authority is exercised; such challenges usually go to the very existence of tribal authority. For example, see Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (challenge to Tribes' authority to impose a sales tax on cigarette purchases made on the Reservation by non-tribal members); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (challenge to Tribe's authority to impose a severance tax on oil and gas produced on tribal lands); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1987), (challenge to the Navajo Nation's authority to impose a Possessory Interest Tax and a Business Activity Tax to a non-Indian company doing business on the Reservation); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (challenges to the tribal courts' jurisdiction over cases brought by tribal members against non-Indians stemming from on-reservation conduct); and FMC Corp v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), (challenge to the Tribes' authority to apply its employment preference ordinance to a non-Indian employer located on fee lands within the boundaries of the Tribes' Reservation).

A broad waiver of tribal immunity would likely lead to a significant increase in the number of such challenges to tribal authority. Although in certain case suits for injunctive relief may be brought against tribal officials (see Santa Clara Pueblo, 436 U.S. at 59) just as they can against officials of a state that is itself protected against suits under the Eleventh Amendment (see Ex Parte Young, 209 U.S. 123 (1908)), the availability of relief -- especially monetary relief -- from the Tribe itself could produce a significant inducement for litigation. Tribes would look to the United States, acting through the Departments of Interior and Justice, to intervene or appear as amicus curiae in such cases. Responding affirmatively to tribal requests would be consistent with the United States' trust responsibility to preserve the self-governing status of tribes in those instances when federal statutory and case law supports the tribe's possession and exercise of the challenged authority. Evaluating requests for involvement in these cases, not to mention responding affirmatively to these requests, is almost certain to require the utilization of additional Federal resources.

3. Before the Federal government takes land into trust on behalf of a tribe, is it required to consider the tax consequence of this decision?

Yes.

Under 25 C.F.R. §§ 151.10 and 151.11, when the Secretary is determining whether to take off-reservation land in trust, he must consider, among other factors, "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e).

4. How would the waiver of tribal immunity affect the Department of Interior's ability to foster and support the Federal government's policy goals of tribal self-determination and self-sufficiency?

The key to tribal self-determination and self-sufficiency is the availability of adequate tribal governmental revenues. Tribes are governments and are responsible for delivering a variety of services to their members and other persons residing and doing business within tribal territory. No government can provide roads, schools, community sanitation systems, law enforcement services, courts, social services and other programs without substantial and reliable sources of revenue.

In Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. __, 113, S. Ct. 684, 687 (1993), the Court recognized that one of the primary benefits of sovereign immunity is the right not to be sued -- the right to avoid the costs and general consequences of the risks of trial and discovery. The need to avoid such costs is just as important to tribal governments as it is to the United States and the States. In fact, given the tenuous financial condition of the overwhelming majority of tribal governments, it is probably much more important to tribes. In addition, the opening of already strapped tribal treasuries to the payment of damages would serve to threaten the viability of many tribes. Given the existing uncertain financial status of most tribes, the additional burdens that a broad waiver of immunity would place on tribes would make the provision of governmental services such as roads, schools, community sanitation systems, law enforcement services, courts, social services and other programs more challenging.

From an economic development perspective, it must be understood that the vast majority of tribes lack a tax base from which to raise governmental revenues. As a result, tribes must engage in commercial activities to raise these revenues. Tribal governments are the source of or the conduit for most investment on the majority of reservations. If tribal governmental resources are depleted due to exposure to "the costs and general consequences associated with discovery and trial" and the payment of money from limited tribal resources, tribal governments will have fewer revenues to invest in reservation-based economic development. This will mean, in turn, fewer revenues to the tribal government, and less jobs for members. Tribes and their members will be swept even further into the cycle of poverty and despair that has been commonplace on too many reservations. If Congress legislates a broad waiver of tribal immunity, this cycle may become inescapable to many tribes and their members.

In short, exposing tribal governments to unlimited lawsuits will deprive tribal governments of badly needed revenues that would otherwise be used to provide important governmental services and investments that would lead to jobs for members, infrastructure development, and additional

governmental revenues. Tribes would remain dependent on the federal government to maintain the barest minimum of services, and the Federal government's goals of tribal self-determination and self-sufficiency would be severely compromised if not completely undermined.

5. If tribal immunity is waived, what would be the immediate or long-term impact, if any, on the Federal government itself, either directly or indirectly?

A waiver of tribal sovereign immunity would have both immediate and long-term impacts to the Federal government that would be both direct and indirect.

For example, section 4 of S. 1691 provides that the district courts of the United States shall have original jurisdiction over civil suits involving Indian tribes and arising under the Constitution, laws or treaties of the United States, and over civil causes of action against tribes sounding in contract and tort. The grant of jurisdiction to hear cases arising under the Constitution, laws or treaties of the United States could be interpreted to confer federal court jurisdiction over intra-tribal disputes involving tribal membership, tribal election disputes and other internal matters because claims of this nature are usually based at least in part on the Indian Civil Rights Act (ICRA). Federal courts do not currently exercise jurisdiction over matters of this nature. The influx of all of these types of cases would undoubtedly add to the already burgeoning case loads of both the federal district courts and the circuit courts of appeal.

As explained in the answer to Question 2, the waiver of tribal immunity would also increase the responsibilities of the Departments of Interior and Justice and require the utilization of additional Federal resources.

6. Your testimony indicated that the costs of defending against claims includes costs of discovery and trial as well as any judgment that might result. Who would ultimately bear the burden of these costs?

Tribal governments would bear the burden of defending against the claims and paying the judgments that would result from a waiver of tribal sovereign immunity. In addition, in situations in which the United States agrees to intervene in litigation pursuant to its trust responsibility to protect tribal self-government, the United States would also bear the costs of trial and discovery.

7. In addition to the tribal governments themselves and the individual tribal membership, would the Federal government ultimately bear any of this burden either directly or indirectly?

Please see the answers to Questions 2, 5 and 6.

8. Under the Self-Determination and Education Assistance Act tribes can contract to perform Federal government functions. These contracts included indirect contract support costs. Would a waiver of tribal immunity increase these costs?

Yes.

Most services the Federal Government performs for the benefit of a tribe are contractible under the Indian Self-Determination and Education Assistance Act (ISDEAA). 25 U.S.C. § 450f(a)(1). These programs include public safety and justice, tribal government, roads, fire management, education, social services, and health care through the Department of Health and Human Services. The ISDEAA specifically provides that professional services supportive of a contracted program are allowable costs. 25 U.S.C. § 450j-1(k)(7). Further, the ISDEAA requires the Departments to fund all indirect costs associated with ISDEAA contracts. 25 U.S.C. § 450j-1(a)(2). Therefore, under a blanket waiver of tribal immunity, the costs of professional services to defend a lawsuit which arose from actions associated with a contracted program would be indirect costs associated with an ISDEAA contract. Thus, it is likely that indirect contract support costs would increase.

9. The Federal Tort Claims Act was extended to cover tribal self-determination contracts and compacts. How would a waiver of tribal immunity that includes these contracts and compacts affect the application of the FTCA?

The Federal Tort Claims Act (FTCA) is a limited waiver of Federal sovereign immunity. It provides that the Federal government will stand in the shoes of an employee of the Federal government in actions for money damages caused by the negligent or wrongful act or omission of that employee acting within the scope of his or her employment. The ISDEAA provides that tribal employees performing work under an ISDEAA contract are deemed federal employees for the purposes of FTCA coverage. See generally, 25 C.F.R. § 900.180 et seq. Thus, under current law, the United States substitutes itself for a tribal employee in any negligence claim arising out of performance of an ISDEAA contract. The limitations of the FTCA are extended to this claim and any damages are paid pursuant to the FTCA, e.g. from the U.S. Treasury and not the tribe. Moreover, the FTCA has many provisions that protects the United States such as the "judicial or legislative immunity defense, 25 U.S.C. § 2674, exclusiveness of FTCA remedy, 28 U.S.C. § 2679, limitations of attorneys fees", 25 U.S.C. § 2678, and others.

If enacted, it is possible that S. 1691 may be interpreted by a court to constitute a repeal of or remedy in addition to the FTCA coverage for ISDEAA contracts and compacts. The repeal of FTCA coverage would have a dramatic effect on tribes and tribal organizations. Currently, FTCA covers all negligence claims including medical malpractice. If the coverage were to be eliminated, tribes would be required to purchase separate negligence insurance and this would increase the tribe's indirect costs dramatically. Once again, Congress, in order to facilitate compliance with its own directive as set forth in 25 U.S.C. § 450j-1(a)(2), would need to fund these increases. In 1988 Congress decided that it would be more economical to extend FTCA coverage to ISDEAA contracts than to include funding for insurance coverage. When enacting the 1988 amendments to the ISDEAA, the Committee report stated,

As originally enacted, the Self-Determination Act authorized either Secretary to require that tribal contractors must obtain liability insurance. The Act also precluded insurance carriers from asserting the tribe's sovereign immunity from suit. In practice, the costs of such liability insurance have been taken from the amount of funds provided to the tribal contractor for direct program costs or for indirect costs. The Committee is concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries. It is clear that tribal contractors are carrying out federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function. Consequently, section 201(c) of the Committee amendment provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out self-determination contracts are considered to be employees of the Federal Government. S. Rep. 274, 100th Cong., 1 Sess., 1987, 1988 *reprinted in* 1988 U.S.C.C.A.N. 2620.

10. Your testimony indicated that several state officials had expressed their opinion that any waiver of tribal immunity would "weaken the political, social and economic infrastructure of tribal communities and impact all state citizens." Could you expand on that theme with more detail?

The statement referenced in the question was made by Governor Gary Locke of the State of Washington in a letter to Senator Slade Gorton. The letter, dated September 10, 1997, addressed section 120 of H.R. 2107, the Interior and Related Agencies Appropriations Bill for the current fiscal year. Governor Locke's statement suggests that he is aware that a broad-based waiver of tribal sovereign immunity would deprive tribal governments of much needed revenues that would otherwise be utilized to provide services to reservation residents and that would be invested in the reservation economy. His letter further suggests a realization that depriving tribes of needed revenues would result in increased poverty in tribal communities, and a greater dependence of tribal members on many state benefits and programs for which they are eligible. Finally, Governor Locke letter also suggests his understanding that economically healthy tribal communities contribute to the economic health of surrounding non-Indian communities.

11. Instead of waiving tribal immunity, your testimony indicates that tribal forums need to be strengthened. What resources are available to or needed by tribes in order to achieve this?

Tribal justice systems remain the most appropriate forums for the adjudication of disputes involving Indians on tribal reservations. Congress recognized the importance of tribal courts in passing the 1992 Indian Tribal Justice Support Act, 25 U.S.C. § 3601(6), although no funds have been appropriated for its implementation. The President's Fiscal Year 1996 budget request included funds to implement the Indian Tribal Justice Support Act, but Congress did not provide the funds and cut the BIA budget by 8% below FY 1995 funding levels.

Despite limited funding, tribes have developed systems to try and cope with the growing demands of tribal communities and changing tribal economies. The vast majority of tribes do not have the resources or revenues to develop the justice systems they envision. Many tribal courts do not have adequate funds to provide basic needs such as adequate physical facilities in which to house a court system, computerization, legal libraries, training for judges and other court personnel and legally trained law clerks to assist judges.

In September 1995, as mandated by the Indian Tribal Justice Support Act, the Bureau of Indian Affairs competitively awarded a contract to a non-federal entity to conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses. Results of the survey will be received and completed in the near future. This study will determine resources and funding, including base support funding, needed to provide for expeditious and effective administration of justice.

12. In order to manage the increased risk of loss of tribal assets, tribes would need to acquire increased liability insurance. Is this insurance generally available to all tribes? From what source?

Yes.

Many Indian tribes have obtained automobile, property owners' and general liability insurance from commercial insurance companies to insure against tort claims by individuals. Some tribes have developed self-insurance programs, and have purchased re-insurance coverage in cases when claims exceed available revenues under the self-insurance program. The ISDEAA extension of Federal Tort Claims Act coverage for certain claims against Indian tribes arising out of performance of ISDEAA contract programs by tribal governments also helps to protect tribes. Insurance and the ISDEAA extension of FTCA coverage preserve sovereign immunity while also providing remedies for persons who may be injured by tribal activities.

Some tribes may be charged excessive rates for insurance from commercial providers. The Committee may wish to consider whether it is advisable to improve access for Indian tribes to affordable insurance for all tribal activities.

Department of Justice

STATEMENT

OF

THOMAS L. LECLAIRE
DIRECTOR
OFFICE OF TRIBAL JUSTICE

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

TRIBAL SOVEREIGN IMMUNITY

PRESENTED ON

MARCH 11, 1998

TESTIMONY ON TRIBAL SOVEREIGN IMMUNITY
Before the Senate Committee on Indian Affairs
March 11, 1998

Mr. Chairman and Members of the Committee, good morning and thank you for inviting the Justice Department to testify on the important subject of tribal sovereign immunity. I am Thomas L. LeClaire, Director of the Office of Tribal Justice, Department of Justice.

Congress and the Executive Branch acknowledge the importance of working with Indian tribes within a framework of government-to-government relations when tribal self-government, tribal land and natural resources, or treaty rights are at issue.[1] In our work within that framework, the Justice Department is guided by fundamental principles that have governed the relations between the United States and Indian tribes for over two hundred years.

Since the formation of the Union, the United States has recognized Indian tribes as "domestic dependent nations" that exercise governmental authority over their members and their territory.[2] In numerous treaties and agreements, our Nation has guaranteed the right of Indian tribes to self-government[3] and pledged to protect Indian tribes.[4] The Administration and the Attorney General honor the United States' commitments to Indian tribes.

Congress has recognized that "the United States has a trust responsibility to [Indian tribes] that includes the protection of the sovereignty of each tribal government."[5] Under the Federal trust responsibility to Indian tribes, the United States should

exercise the highest standard of care in matters of tribal self-government.

Continued recognition of tribal sovereign immunity is an important part of the Federal Government's protection of tribal self-government, which furthers the United States' longstanding policy of encouraging Indian self-determination and economic development.

THE DOCTRINE OF SOVEREIGN IMMUNITY

Sovereign immunity is a fundamental aspect of sovereignty, which protects a government from suit to avoid undue intrusion on governmental functions or depletion of the government's treasury without legislative consent.

Under federal law, the doctrine of sovereign immunity is well settled, and fundamental maxims guide the federal courts in cases that touch on the United States' sovereign immunity:

- The United States is immune from suit in the absence of an affirmative waiver of immunity;
- Only Congress may waive the sovereign immunity of the United States;
- A waiver of the sovereign immunity of the United States must be unequivocally expressed; and
- Waivers of the sovereign immunity of the United States are strictly construed in favor of the sovereign.[6]

Congress carefully considers any waiver of federal sovereign immunity, mindful of potential impacts on federal governmental functions and our treasury. Waivers of the sovereign immunity of

the United States are usually limited to the federal courts. Where the United States has not waived its sovereign immunity, the Federal Government regularly relies on its immunity to bar suits.[7]

In regard to the states, the Eleventh Amendment of the Constitution of the United States embodies the principle of sovereign immunity and protects the dignity and respect afforded to the states in our federalist system.[8] Absent state consent or congressional abrogation pursuant to a valid exercise of power, sovereign immunity bars suits by foreign nations, Indian tribes and private individuals against the states in federal court.[9] It likewise bars suits by foreign nations, Indian tribes, and private individuals against states in their own courts absent state consent or an Act of Congress.[10] States regularly rely on their sovereign immunity to bar suits to which they do not consent.[11] States have relied on the Eleventh Amendment to bar suits by Indian tribes before the United States Supreme Court in three cases within the past ten years.[12]

When states waive their sovereign immunity, they guard state governmental functions and state treasuries and often limit their waivers of immunity to actions before the state courts. In state statutory waivers of immunity for tort actions, states reserve sovereign immunity to protect discretionary government functions from suit.[13] States also frequently limit government liability for monetary damages and bar recovery for exemplary or punitive damages.[14]

THE SOVEREIGN IMMUNITY OF TRIBAL GOVERNMENTS

"Indian tribes are sovereigns" which predate the formation of the United States.[15] Accordingly, absent tribal government waiver or congressional abrogation, Indian tribes retain sovereign immunity as an aspect of inherent tribal sovereignty. Under the federal-tribal governmental relationship, it is well settled that only Congress or the governing body of an Indian tribe may waive a tribe's sovereign immunity from suit.[16]

Congress has acted to protect tribal sovereign immunity and has provided appropriate venues for dispute resolution which do not jeopardize tribal government functions or financial solvency. The Indian Self-Determination and Education Assistance Act (the "ISDEAA"), for example, authorizes Indian tribes to contract with the Secretaries of the Interior and Health and Human Services to perform governmental functions that their departments otherwise would perform in Indian country.[17] The ISDEAA provides that the Secretary of the Interior should assist Indian tribes in obtaining insurance and prohibits the insurers from raising tribal sovereign immunity as a defense to a covered claim. The ISDEAA extends Federal Tort Claims Act coverage to claims against an Indian tribe directly "resulting from the performance of functions under . . . [an ISDEAA] contract."[18] The ISDEAA preserves tribal soverign immunity while providing mechanisms for compensating injured parties.[19]

A. Contract Claims

In our view, the longstanding federal recognition of tribal

sovereign immunity does not raise significant policy concerns in the area of contract claims. The doctrine of tribal sovereign immunity is well known and an Indian tribe's immunity from suit does not leave a potential commercial partner unable to protect its interests.[20] For example, a retailer may request advance payment from a tribal government. A prospective business partner may choose to contract with subordinate tribal corporations or entities that have waivers of sovereign immunity in their organizational documents. A joint venturer may request that the tribe consent to suit in the contract that establishes the joint venture with the tribe. Or, a prospective commercial partner may negotiate transaction specific waivers of sovereign immunity or security arrangements such as escrow accounts, bonds, or letters-of-credit to ensure against financial loss from non-performance of the contract by the tribal government. These mechanisms are available under existing law and simply require sound business planning to implement them.

B. Tort Claims

The Department of the Interior informs us that many Indian tribes have obtained automobile, property owners', and general liability insurance to insure against tort claims by individuals and the ISDEAA extension of Federal Tort Claims Act coverage for certain claims against Indian tribes arising out of performance of ISDEAA contract programs by tribal governments. Insurance and the ISDEAA extension of FTCA coverage preserve sovereign immunity while also providing for coverage of tort claims against tribes.

The Committee may wish to consider whether it is advisable to improve access for Indian tribes to affordable insurance for tribal commercial activities. For example, the United States might charter an intertribal insurance corporation to provide insurance for tribal commercial activities, with insured Indian tribes as shareholders. The Indian tribes would pay insurance premiums to the intertribal insurance corporation and obtain insurance. Covered tort claims could be made against the corporation directly, rather than against the Indian tribes. The insurance corporation could be barred from raising sovereign immunity as a defense to a covered claim (as under the ISDEAA) and recovery against the insurance corporation could be limited to the relevant policy limits. Punitive damages could be barred. Such an arrangement would build on the existing models in the ISDEAA, without impairing tribal sovereign immunity, and could provide needed institutional infrastructure for Indian country.

C. State Taxation in Indian Country

Indian tribes and reservation Indians are subject to tribal law and accordingly, are generally exempt from state taxation and regulation in Indian country. As the Supreme Court explains:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3. . . . As a corollary to this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.[21]

When Indian tribes or individual Indians generate value through economic activities within their reservations, federal law may

also preempt state taxation of non-Indians engaged in commerce with them.[22]

In contrast, under prevailing Supreme Court rulings, where Indian tribes or individual tribal retailers market prepackaged goods to non-Indians, without adding reservation value, the non-Indian consumers may be liable to pay non-discriminatory state taxes on the transactions.[23] In such circumstances, the Indian tribes also have authority to tax the non-Indian consumers, but the states are not required to provide credit for tribal taxes on the same transactions, so a dual tribal-state tax burden on reservation commerce with non-Indians is possible. Many tribes remain reluctant to "stack" tribal taxes and state taxes.

The Supreme Court has recognized that states and Indian tribes may enter "mutually satisfactory" tax agreements,[24] and to avoid undue burdens on commerce and facilitate tax collection, seventeen states have entered into such tax agreements with Indian tribes. These agreements vary. Some state-tribal tax agreements provide that the state will forgo its taxes, and the Indian tribe may retain all tribal taxes from sales to non-Indians, provided that the tribal taxes approximate the amount of state taxes that would otherwise be imposed. Other agreements call for a division of the taxes on sales to non-Indians between the state and the tribe to avoid dual taxation while others are simply collection agreements.

In our view, agreements are the best mechanisms for mutually satisfactory resolution of tax collection issues between states

and tribes. If states and tribes are unable to reach agreement, however, states may impose their taxes at the wholesale level to collect states taxes on prepackaged goods that are destined for sale to non-Indians before they are imported to Indian country.[25] Thus, we concur with the Interior Department, legislative waiver of tribal sovereign immunity in this area is unwarranted.

TRIBAL SELF-GOVERNMENT AND TRIBAL COURTS

The Interior Department informs us that Indian tribes frequently enact their own waivers of sovereign immunity. We would expect that, just as the United States regularly limits federal waivers of sovereign immunity to the federal courts and states regularly limit their waivers of sovereign immunity to state courts, Indian tribes regularly would limit their waivers of sovereign immunity to tribal courts.[26] Accordingly, in considering tribal sovereign immunity, it is important to bear in mind the full significance of tribal court authority to tribal self-government.

Tribal courts are central institutions of self-government because they are "important forums for ensuring public health and safety" and for adjudicating "disputes affecting personal and property rights" in Indian country. Tribal courts give life to traditions and values embodied in tribal law and are essential to the political integrity, culture, and identity of tribes.[27]

Recognizing the importance of tribal courts as institutions of justice, the Justice Department has been working cooperatively with the Interior Department to assist tribal courts. Tribal

leaders have often requested support for tribal courts, and, in response, the Justice Department's Office of Policy Development established a Tribal Courts Project to assist them by developing innovative training, providing information, and encouraging cooperation between the federal, state, and tribal court systems. To complement these efforts, the Department's Bureau of Justice Assistance has funded grants to improve cooperation between federal, state, and tribal courts and funded training for tribal judges at the Federal Judicial Center and the National Judicial College. The Office of Justice Programs is working with tribal courts through our Drug Courts Program and Violence Against Women Programs, among others. For FY '99, the Justice Department will seek increased funding to assist tribal courts. Our goal in undertaking these efforts is to help ensure that tribal courts may take their place as partners with state and federal courts in the nationwide administration of justice.

CONCLUSION

The Justice Department respectfully submits that, to the greatest extent practicable, legislation dealing with tribal sovereign immunity should be developed based on consultation and consensus with Indian tribes. In our view, legislation in this area should preserve tribal governmental solvency, authority, and functions, including tribal court authority and tribal sovereign immunity.

Thank you for inviting the Justice Department to present its views on this important matter today.

1. See e.g., 25 U.S.C. §§ 3601, 3701; Executive Memo. on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (1994); Proclamation of American Indian Heritage Month, 57 Fed. Reg. 56801 (1992); U.S. Dept. of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 61 Fed. Reg. 29424 (1996).

2. In Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991), the Supreme Court explained that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereignty over their members and their territory." Id. (quoting) Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

3. In Ex Parte Crow Dog, 109 U.S. 556, 568-69 (1883), for example, the Supreme Court explained that under the Treaty of 1868 with the Sioux, "among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among [the Indians], was the highest and best of *all*, that of self-government." Earlier, in the seminal case Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court had ruled that the Treaty of Holston "recogniz[ed] the national character of the Cherokees, and their right of self-government."

4. For example, the 1786 Treaty between the United States and the Shawnee Nation proclaims, "The United States do grant peace to the Shawanoe nation, and do receive them into their friendship and protection. . . ." 7 Stat. 26. The 1785 Treaty with the Cherokee Nation extends federal protection and recites that "the Indians may have full confidence in the justice of the United States." 7 Stat. 18. These treaties are exemplary of Indian treaties of that period. The United States also pledged that Indian reservations would be preserved as the "permanent homes" of the Indian peoples. See Treaty with the Sioux, 1868, 15 Stat. 635. Consistent with these treaty pledges, the Supreme Court has held that Indian tribes retain essential rights "necessary to make their reservations livable." Montana v. United States, 450 U.S. 544, 566 n. 15 (1980).

5. 25 U.S.C. § 3601(2); see also 25 U.S.C. §§ 450, 1451, 1601, 2501-2502, 3701, and 4101.

6. See generally Lane v. Pena, 518 U.S. 187 (1996); United States v. Nordic Village, 503 U.S. 30 (1992).

7. See e.g., Smith v. United States, 507 U.S. 197 (1993) (widow of employee of government contractor was barred by sovereign immunity from asserting wrongful death claim for accidental death occurring in Antarctica); Lane v. Pena, supra (merchant marine's claim for money damages arising out of wrongful termination barred by sovereign immunity).

8. Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2033 (1997).

9. Monaco v. Mississippi, 292 U.S. 313 (1934) (Eleventh Amendment bars suit by foreign nation against a state in federal court); Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (Eleventh Amendment bars suit by Indian tribe against a state in federal court); Hans v. Louisiana, 134 U.S. 1 (1890) (Eleventh Amendment bars suit by private citizen against a state in federal court).

10. See e.g., Ashland Equities Co. v. Clerk of New York County, 493 N.Y.S.2d 133 (N.Y.App.Div. 1985).

11. For example, under the related doctrine of legislative immunity, the Supreme Court held on March 3, 1998 that local legislators enjoy absolute legislative immunity for their actions as legislators. Bogan v. Scott-Harris, ___ S.Ct. ___ (1998).

12. Idaho v. Coeur d'Alene Tribe, supra; Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996); Blatchford v. Native Village of Noatak, supra.

13. Everett v. Willard, 468 So.2d 936 (Fla. 1985) (sheriff's decision to permit intoxicated motorist to drive on after stop involved an exercise of a discretionary function shielded by state sovereign immunity, and sheriff's department was immune from a tort action brought by an innocent third party after a subsequent collision with the intoxicated driver).

14. For example, the State of Nevada limits its monetary liability in tort actions to $50,000 and bars recovery for exemplary and punitive damages. N.R.S. § 41.025. The State of Colorado generally limits the monetary liability of public entities in tort actions to $150,000 for an injury to one person arising out of a single incident. For injuries to two or more persons arising out of a single incident, the monetary liability of public entities is generally limited to $600,000, and punitive damages are generally barred. C.R.S.A. § 24-10-114. The State of Texas has granted permission to sue the state for certain claims, but "permission to sue does not waive to any extent [the state's] immunity from liability," so a subsequent legislative appropriation may be necessary to satisfy resulting judgements. V.T.C.A. § 107.002; cf. Federal Sign v. Texas Southern University, 951 S.W.2d 29 (Tex. 1997) (contractor barred from suing state university for money damages without consent).

15. Blatchford v. Native Village of Noatak, 501 U.S. at 779; see Worcester v. Georgia, 31 U.S. at 558-561.

16. Oklahoma Tax Comm'n v. Citizens Band Potawatomi, supra; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977); United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940).

17. 25 U.S.C. §§ 450 et seq.

18. 25 U.S.C. § 450f.

19. 25 U.S.C. § 450n.

20. For example, in a publication entitled, "A Guide to Mortgage Lending in Indian Country" (1997), the Comptroller of the Currency explains:

> Sovereign immunity is a governmental immunity that prevents a court from entering orders against the government in the absence of a clear waiver. As governments, Indian tribes enjoy sovereign immunity from suit under federal common law. Tribal sovereign immunity is similar to the sovereign immunity of the United States or of individual states. Although tribal sovereign immunity does not cover individual Indians, it does extend to tribal government agencies, such as Indian housing authorities.

Id. at 9; see also Office of the Comptroller of the Currency, Department of Treasury, "Providing Financial Services to Native Americans in Indian Country," (1997) at 6 (successful "banks have established good working relationships with the tribes to address the issues of sovereign immunity. . ."). Similarly, one of the leading commentators on federal civil court practice explains: "Native American tribes are sovereigns. . . . [T]he Supreme Court has held that Native American tribes have immunity from suit by states." D. Coquillette, et al., Moore's Federal Practice § 123.10[6] (1997). Thus, the business and financial community have reasonable notice that Indian tribes possess sovereign immunity.

21. Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985).

22. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), for example, the Supreme Court held that non-Indian hunters using a tribal hunting enterprise on reservation lands were exempt from state hunting regulations. The Court explained the basis for its decision as follows:

> The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. . . . The Tribal enterprise . . . clearly involves "value generated on the reservations by activities involving the Tribe."

Id. at 340. Accordingly, the State had no authority to impose license requirements and fees on non-Indians using the valuable hunting resources generated by the Tribe on its reservation. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian engaged in reservation timber production with Indian tribe was exempt from state motor fuel taxation).

23. Washington v. Colville, 447 U.S. 134 (1980) (prepackaged cigarettes).

24. Oklahoma Tax Comm'n v. Citizens Band Potawatomi, 498 U.S. at 514 applying 25 U.S.C. § 476; see Department of Taxation and Finance v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 72 (1994).

25. Oklahoma Tax Comm'n v. Citizens Band Potawatomi, supra.

26. The Menominee Tribe has enacted a statute "waiving immunity in tribal court." R. Clinton, N. Newton & M. Price, American Indian Law: Cases and Materials (1991) at 342; see also Williams v. Lee, 358 U.S. 217 (1959) (absent a contrary statute, tribal court jurisdiction in civil cases against Indians in Indian country is exclusive of state court jurisdiction); Kennerly v. District Court, 400 U.S. 423 (382) (same); Fisher v. District Court, 424 U.S. 382 (1976) (same). We note that state government are at times hostile to tribal self-government, see Cherokee Nation, supra (despite treaty recognizing tribal self-government, state legislature purported to outlaw tribal self-government), so Indian tribes would not view state courts as "neutral" forums.

27. 25 U.S.C. § 3601.

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-96-1024

Granite Valley Hotel Limited Partnership,
d/b/a Granite Valley Hotel,
Respondent,

vs.

Jackpot Junction Bingo and Casino,
a Business Enterprise of the Lower Sioux Indian Community,
Appellant.

Filed February 18, 1997
Affirmed
Forsberg, Judge*
Concurring Specially, Randall, Judge

Redwood County District Court
File No. C49614

John E. Jacobson, Joseph F. Halloran, Jacobson, Buffalo, Schoessler & Magnuson, Ltd., 810 Lumber Exchange, 10 South Fifth Street, Minneapolis, MN 55402 (for Appellant)

Timothy W. Nelson, Nelson Personal Injury Attorneys, 1010 West St. Germain, Suite 440, St. Cloud, MN 56301 (for Respondent)

Considered and decided by Randall, Presiding Judge, Davies, Judge, and Forsberg, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

When a state district court and an Indian community's tribal court have concurrent jurisdiction over an action, the district court may properly decide issues of sovereign immunity and jurisdictional consent without deferring to the jurisdiction of the tribal court, if retention of jurisdiction does not interfere with matters of tribal self-government.

OPINION

FORSBERG, Judge

This case arises from a breach of contract action filed by respondent, Granite Valley Motel Limited Partnership (Granite Valley),[1] against appellant, Jackpot Junction Bingo & Casino (Jackpot Junction), seeking monetary damages for Jackpot Junction's alleged breach of a motel occupancy agreement. On a pretrial motion, the trial court declared that it had jurisdiction over the case and that Jackpot Junction's owner and operator, the Lower Sioux Indian Community (Community), had effectively waived its sovereign immunity. Jackpot Junction appeals the order declaring jurisdiction, arguing the trial court erred in refusing to defer to the jurisdiction of the Community's tribal court for determination of whether the Community effectively waived its sovereign immunity and consented to the jurisdiction of Minnesota courts. We affirm.

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[1] Because the original action was titled as such, the case name reflects respondent's identity as "Granite Valley Hotel Limited Partnership." However, we refer to respondent as "Granite Valley Motel Limited Partnership," the name under which it is registered with the Secretary of State.

FACTS

On November 14, 1991, Granite Valley and Jackpot Junction entered into a written agreement whereby Jackpot Junction, through the Community, guaranteed occupancy of a certain number of rooms in the Granite Valley Motel (motel) in exchange for Granite Valley constructing the motel. The contract provided that if the agreed-upon occupancy percentage was not satisfied, Jackpot Junction was obligated to pay to Granite Valley an amount equal to the charter rates for the balance of the unsold rooms. Because construction of the motel would require substantial capital, and the motel's only purpose was to serve Jackpot Junction patrons, Granite Valley required safeguards in the form of contract provisions waiving sovereign immunity and consenting to jurisdiction of Minnesota courts. Allen J. Kokesch, general manager of Jackpot Junction and purported representative of the Community, initiated the contract talks and ultimately signed the contract as "General manager, on behalf of The Lower Sioux Indian Community."

Jackpot Junction performed under the contract until approximately 1993, when it refused to continue paying for unsold rooms. That same year, the Community created its own tribal court, and later began construction on a new motel located on reservation property. On October 27, 1995, Granite Valley filed a complaint against Jackpot Junction in Minnesota district court, alleging breach of contract. Jackpot Junction moved the court to dismiss the action on the grounds of sovereign immunity, invalid consent to jurisdiction, and the doctrine of comity. In response, Granite Valley moved the court for a declaration

of jurisdiction, which the court granted. Jackpot Junction now appeals the order declaring jurisdiction.

ISSUE

When a state district court and a tribal court have concurrent jurisdiction over an action, does the doctrine of comity require the district court to defer to the tribal court's jurisdiction for resolution of sovereign immunity and jurisdictional consent issues?

ANALYSIS

When a trial court goes beyond the pleadings on a motion for dismissal, this court reviews the trial court's decision under a summary judgment standard. Minn. R. Civ. P. 12.03; *McAllister v. Independent Sch. Dist. No. 306*, 276 Minn. 549, 551, 149 N.W.2d 81, 83 (1967). On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Review under this standard is appropriate here because the trial court issued its order upon consideration of both the pleadings and supporting affidavits.

Jackpot Junction's challenge rests on the theory that notwithstanding a valid exercise of jurisdiction by a state district court, the court must, as a matter of law, defer to the Community's tribal court for determination of whether the Community effectively waived its sovereign immunity and consented to the jurisdiction of Minnesota courts. We disagree.

When both a state court and a tribal court have jurisdiction to entertain a dispute involving questions central to the governance of an Indian tribe, the doctrine of comity

generally divests state courts of jurisdiction as a matter of federal law if retention of jurisdiction by the state court would interfere with matters of tribal self-government. ***Iowa Mut. Ins. Co. v. LaPlante***, 480 U.S. 9, 14-15, 107 S. Ct. 971, 975-76 (1987); ***see National Farmers Union Ins. Cos. v. Crow Tribe of Indians***, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2454 (1985) (reversing exercise of jurisdiction on grounds that exhaustion of tribal remedies is required before claim can be entertained by federal court).

Deferral to a tribal court for exhaustion of remedies is not based on whether a trial court properly has jurisdiction over an action. ***Klammer v. Lower Sioux Convenience Store***, 535 N.W.2d 379, 380 (Minn. App. 1995). Rather, it is grounded in the federal policy of promoting tribal self-government. ***Id.***; ***see also Iowa Mut. Ins.***, 480 U.S. at 16, 107 S. Ct. at 976 (holding that federal policy supporting tribal self-government "directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction'") (citation omitted). Thus, the question before us is whether the facts and legal theories underlying this case require analysis of issues central to the governance of an Indian tribe, which must be heard by a tribal court. We hold they do not.

Jackpot Junction contends that this case begs the question of proper delegation of authority to Kokesch, and, therefore, it is necessary to review the Community's delegation documents and procedures. However, the facts of this case present issues of contract interpretation and apparent authority, rather than actual authority. In rendering its decision, the trial court reviewed the contract, pleadings, and affidavits submitted by both parties, without having to resort to tribal documents or procedures for guidance. While examination

of tribal documents may be necessary to resolve a question of actual authority, apparent authority is a question for the trier of fact to decide after considering the parties' dealings under the contract, the defendant's actions, and other outward manifestations of delegation of authority. ***See Hagedorn v. Aid Ass'n for Lutherans***, 297 Minn. 253, 257, 211 N.W.2d 154, 157 (1973) (holding apparent authority presents question for trier of fact). Under these circumstances, we conclude the trial court's exercise of jurisdiction and determination of the Community's waiver of sovereign immunity does not "undermine the authority of the tribal courts" or "infringe on the right of the Indian[ ] [tribes] to govern themselves." ***See Williams v. Lee***, 358 U.S. 217, 223, 79 S. Ct. 269, 272 (1959) (disallowing state exercise of jurisdiction that would intrude upon authority of tribal courts over reservation affairs).

Jackpot Junction next urges that this court's recent decision in ***Klammer*** is dispositive in this case. In ***Klammer***, the Community was the defendant, and we deferred to the tribal court for resolution of jurisdictional and sovereign immunity issues. ***Klammer***, 535 N.W.2d at 382. However, ***Klammer*** is distinguishable from this case. First, the basis of the action in ***Klammer*** was property damage that occurred on the premises of the Indian reservation, ***id.*** at 379. whereas this case involves a contract performed off the reservation. Second, unlike the situation here, the Community in ***Klammer*** did not explicitly waive its sovereign immunity or consent to jurisdiction of the Minnesota courts. ***See generally id.*** at 380. Because our determination of the Community's sovereign immunity and consent to jurisdiction

in *Klammer* necessitated examination of tribal documents such as the "sue and be sued clause" contained in Community documents, that action involved issues of the Community's self-government. Here, however, none of these documents are at issue. Thus, *Klammer* does not impact our ruling today.

Finally, Jackpot Junction's interpretation of the exhaustion rule as applied to these facts would effectively render all waiver and consent provisions in this context impotent. As a result, the Community's economic independence, which forms the basis of the Community's self-determination, would most likely suffer. When the Seventh Circuit confronted a similar fact situation, it noted:

> [E]conomic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of choice of law and venue provisions, [the Indian business] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught.

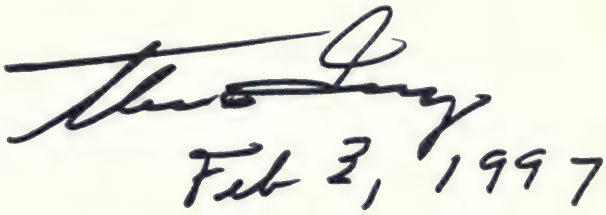
Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir. 1993), *cert. denied*, 510 U.S. 1019 (1993). This is surely the case here, where the Community actually performed under the contract for several years before deciding to breach the contract and build its own motel. For the above reasons, we hold the trial court did not err in refusing to defer to the Community's tribal court for determination of whether the Community effectively consented to jurisdiction of the Minnesota courts and waived its sovereign immunity.

DECISION

Because the district court in this case may decide contract and apparent authority issues without interfering with matters of tribal self-government, the court need not defer

to the jurisdiction of the tribal court for resolution of whether the Community effectively waived its sovereign immunity or consented to state court jurisdiction.

Affirmed.



RANDALL, Judge (concurring specially).

> In Indian country it is what you know, not what you read. The truth is in the shadows, in the wind, in the water, in the rocks, and in the silence.

Gerry Spence, the noted Wyoming trial attorney, is a self-styled "gunner for justice." Spence, who has a deserved reputation for backing up what he says, learned early in life the importance of not just reading, but thinking; of not just looking, but seeing; of not just hearing, but listening. In his book, ***With Justice for None***, he uses a quote from Thomas Hobbes to make the point:

> Although I respect the valuable insights of some academicians, and shamelessly cite them as authorities whenever it serves my purpose, I believe their conclusions are often flawed, for they have failed to expose themselves in the workplace of the law, in the pits where the killing is done and the most pungent truths revealed. Naturally my kind likes the boast of Thomas Hobbes: "Had I read as much as other men, I should have known as little as other men."

Gerry Spence, ***With Justice for None***, at xi (1989).

Albert Einstein, himself one of the most gifted thinkers and theoreticians of all time, also knew the importance of participation in life and hands-on experience to supplement that which can be gained from books, and at times to learn what cannot be understood from books at all. Einstein was an acknowledged opponent of armed conflict and, thus, also an opponent of virulent "nationalism" and excessive trumpeting of "sovereignty." The fledgling League of Nations in 1931 "encouraged an exchange of letters between leaders of thought" for the purpose of bringing to bear the best minds of the time on the problem of war, a subject which to Einstein was "the most insistent of all

the problems civilization has to face." As part of the collection of letters, Einstein wrote a letter of four pages to Dr. Sigmund Freud, which was later published in a limited edition under the title "*Why War*?"

In pertinent part, Einstein said:

> These are the actions which have always been successful when the goal was to bring together larger political communities, and in this way to prevent armed conflict between them. The road to international security demands the unconditional renunciation by all nations of part of their freedom of action and sovereignty. I doubt that there is another way to international security.
>
> * * * The desire for power makes the ruling party of a nation resist any limitation of its rights to sovereignty; the leaders feel their position of power threatened, as do industrialists whose economic strength is based on armaments and war.

Albert Einstein. *Why War?* (1933). Einstein then went on to discuss a question that puzzled him, namely how groups of people could permit themselves "to become aroused to the point of insanity and eventual self-sacrifice * * * ." *Id.*

In answering his own question as to how communities of people could get so far off track, he pointed unerringly to the inability of the "ivory tower crowd" to contribute to the formation of social justice in a multicultural world, war being the extreme example of social injustice. Einstein said:

> This leads me to a last question: is it possible to so guide the psychological development of man that it becomes resistant to the psychoses of hate and destruction? I am not thinking only of the so-called uneducated. In my experience, it is much more the so-called intelligentsia who succumb most readily to mass suggestion, because they are not used to drawing immediately from experience but encounter life in its most easily and completely understood form--the printed page.

Id.

It can be said that the unlikely trio of Thomas Hobbes, Gerry Spence, and Albert Einstein would have been able to contribute to the serious and institutionalized problems facing Indian country today. You see, all three had the courage to face issues of social justice, not shy away from them.

I concur specially in the result, our affirmance today of the trial court on all issues. That affirmance takes but a quick look at prevailing contract law. The essence of contract law is that parties should do what they say they will do. Our decision here assures simply that, as Justice William Mitchell once said, "just debts will be paid." But I have to add to the analysis of my colleagues to cover the real issue of whether appellant, a recognized Indian reservation, is a true "Sovereign Nation," or is rather a semi-sovereign governmental entity. Appellant demands an answer to that issue. I suggest that case law, when read, not just cited, makes it clear that reservation tribal governments are not true independent sovereigns, but rather semi-sovereign entities totally under the jurisdiction of the United States Congress and the United States Supreme Court. In fact, there are no cases that state otherwise.

The eleven American Indian reservations in this state, the four Dakota Sioux (including appellant) south of the metro area, and the seven Anishinabe/Ojibwe reservations in the northern half of the state are simply eleven semi-sovereign governmental entities, but, tragically, eleven semi-sovereign governmental entities that

do not extend the basic rights of the Minnesota Constitution and the United States Constitution to their people.

This lawsuit on its face is a simple breach of contract lawsuit for money damages brought by respondent against appellant. But appellant, in its reply brief, **challenged** this court to go outside the **black letter**, four corners of the contract (the contract itself, the court file, and the entire record to date show an alleged blatant breach of that contract by appellant) and **address issues of sovereignty and sovereign immunity**. I accept the challenge. Appellant has a right to that. It is entitled to a legal analysis.[1]

I agree with appellant that "sovereignty" and sovereign immunity is the only real issue in this case. If it were not for this issue, both appellant and respondent, as they agreed to in writing, would be presenting their respective claims and defenses in the Minnesota District Court for the Fifth Judicial District, Redwood County, where this case started and from where the appeal came to this court. But as appellant's brief states:

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[1] An early comment on the length of this concurrence is appropriate. As Tolstoy might have said, "***Anna Karenina*** is long, but I believe it to be worthwhile. I have written another book called ***War and Peace***. I suggest it would be helpful in understanding the historical perspective of my homeland, Russia, and why I love it so much to read them both."

I suggest that ***Cohen v. Little Six, Inc.***, 543 N.W.2d 376 (Minn. App. 1996) (Randall, J., dissenting), ***aff'd*** (Minn. Jan. 21, 1997), be reread along with this opinion. The two opinions, taken together, just begin to scratch the surface of the history of American Indian people and their struggle for social justice. But the two, taken together, may, like ***War and Peace***, show how a trickle of blood from a scratch can escalate to a river, and then to a raging flood.

> In reality, Granite Valley alleges that it has an enforceable contract with a sovereign tribal government, and that the contract may be enforced in State Court based on the purported assent of that government. These assertions **require** a court's analysis to go beyond simple notions of contract law, to also address issues of sovereignty and sovereign immunity.

Appellant's reply brief further declares:

> With this backdrop, the District Court should have looked at the **core challenge** to the contract in this action: **The authority, or lack thereof, of a non-Indian to waive tribal sovereign immunity**. In addressing this challenge the Court undoubtedly **would be required to evaluate tribal sovereign immunity, relevant tribal resolutions or ordinances regarding waivers of immunity**, and possibly the common practice and custom of the Community in waiving its immunity.

(Emphasis added.)

The facts are simple and not in dispute. Respondent Granite Valley Motel is a limited partnership consisting of eight individual investors. Appellant Jackpot Junction is a business enterprise of the Lower Sioux Indian Community and operates as a casino on Indian land near Morton, Minnesota, in Redwood County.

Appellant wanted an off-reservation motel close enough for its patrons. Respondent was willing to consider a substantial investment but needed a guaranteed occupancy of a certain number of rooms in its motel, as without guaranteed occupancy (meaning guaranteed cash flow) by appellant, there would be no reason for respondent to construct a motel in a relatively isolated area. Appellant understood this fully and completely, and as a part of the negotiations agreed in the written contract that appellant would guarantee occupancy of a certain number of rooms until 1999.

Respondent wanted a specific waiver of sovereign immunity and a specific consent to Minnesota state court jurisdiction written into the contract as part of the negotiations and before respondent would sign it. Appellant understood these negotiations and consulted with an attorney about them. The uncontradicted affidavit of plaintiff J. P. Martin is part of the trial court record. It said in pertinent part:

> I had discussions with Mr. Kokesch about the issue of sovereign immunity and he told me that he had talked to another individual by the name of Bluedog, and that I should go ahead and put that clause in the contract if I was concerned about that issue.

Appellant and respondent expressly wrote into the contract a waiver of immunity and an express consent to Minnesota state court jurisdiction. Nothing was put into the contract, or even discussed by appellant, formally or informally, that they wanted to "reserve the right to back out" of this express waiver of immunity. Neither the negotiations nor the written contract contained any reference to appellant's tribal court system. As of the date of the signing of the contract, appellant **did not have** its own tribal court system. They created one later. (Evidence is accumulating that the fairly recent creation of tribal courts in Minnesota may be part of a calculated plan by tribal governments and their advisors to create a totally controlled in-house court system to shield themselves from lawsuits and accountability in state district court where the mandates of state and federal constitutions apply.)

The contract was formalized in writing and appears in full in respondent's brief The contract is dated November 6, 1991 and was signed on November 14, 1991 in the following manner:

> Yours truly,
>
> GRANITE VALLEY MOTEL LIMITED PARTNERSHIP
> By: Hall & Associates, Inc.
> Its Managing General Partner
>
> By: /s/ Greg Hall
> Greg Hall, C.E.O.
>
> Agreed and acknowledged this 14 day of November, 1991, by The Lower Sioux Indian Community, owner and operator of Jackpot Junction Bingo and Casino.
>
> /s/ Allen J. Kokesch
> General Manager, on behalf of The
> Lower Sioux Indian Community

The contract contains five sections. The second section shows the term of appellant's guarantee to respondent. This section is part of the breach and states:

> 2. Term of Guarantee. This is a continuing guarantee, for the term commencing on commencement of occupancy of the motel and ending December 31, 1999.

Appellant unilaterally breached this contract in 1993 and refused to perform under its terms.

That same year, appellant created its own tribal court under its own jurisdiction, which tribal court appellant now wants to hear this lawsuit first. Appellant then went on

to construct its own motel on reservation property which directly competes with respondent's. At the same time, appellant continued an ongoing breach of its contract with respondent. The waiver of immunity and consent to jurisdiction in Minnesota district courts is set out in the third section, which states:

> 3. Waiver. The Guarantor hereby waives sovereign immunity by virtue of its status as an independent Indian Nation and consents to jurisdiction of the Courts of the State of Minnesota in the interpretation and enforcement of this contract of guarantee.

Appellant, as "Guarantor," continued on in the fourth section, which states:

> 4. Character of Obligation. The obligation of the Guarantor is a primary and unconditional obligation binding upon this Guarantor, its legal representatives, successors and assigns.

After appellant unilaterally breached the contract and refused any consideration to respondent, respondent, pursuant to the contract, sued in the closest Minnesota district court with venue and jurisdiction. The trial court, which we affirm today, found that with the words of the contract clear and unambiguous, there was no need to look beyond the four corners of the contract.

The trial court, in ruling that respondent had the right to bring this lawsuit in district court and that the trial court had the authority to keep the lawsuit there, stated in its memorandum:

> At this stage of the proceedings the contract must be examined on its face. The contract under the heading "Waiver" states, "The Guarantor hereby waives sovereign immunity by virtue of its status as an Indian Nation and consents to jurisdiction of the Courts of the State of Minnesota in the interpretation and enforcement of this contract of guarantee." The document is signed by a representative of plaintiffs, as well as Allen J.

> Kokesch, General Manager, on behalf of The Lower Sioux Indian Community. Above Mr. Kokesch's signature is an acknowledgment "by The Lower Sioux Indian Community, owner and operator of Jackpot Junction Bingo and Casino."

In its memorandum, the trial court went on to state:

> At this stage of the proceedings the Court must give great deference to the face of the contract, which contains the explicit waiver of sovereign immunity referred to above. If assertions by affidavit at this early stage of the proceeding were sufficient to remove this matter to tribal court, then the *clear waiver of sovereign immunity clause in the contract would be without meaning*.

(Emphasis added.)

In its memorandum, the trial court pointed out that even the United States, a true sovereign, can consent to be sued, waive its sovereign immunity, and further stated

> that when consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction. ***United States v. Mitchell***, 445 U.S. at 538; ***United States v. Sherwood***, 312 U.S. 584, 586, 61 S. Ct. 767, 769, (1941); ***Reynolds v. United States***, 643 F.2d 707, 713 (10th Cir.), ***cert. denied***, 454 U.S. 817, 102 S. Ct. 94 (1981).
>
> The court finds that this contract does contain an expressed waiver of sovereign immunity, and as such establishes this Court's jurisdiction over the above-entitled matter.

Appellant, in attempting to get out of a contract which it signed and a contract for which it has yet to allege a defense on the merits, spends most of its energy in its brief arguing that ***Klammer v. Lower Sioux Convenience Store***, 535 N.W.2d 379 (Minn. App. 1995), controls.

Once the facts of ***Klammer*** are read, it is clear that it is distinguishable and does not have relevance to the legal issue here, other than to buttress our affirming the trial

court. In ***Klammer***, there was neither a negotiated consent to jurisdiction nor a negotiated waiver of immunity clause. There could not have been. ***Klammer*** was a spontaneous tort which resulted in property damage. In ***Klammer***, a non-Indian patron of a convenience store owned by the Indian Community sued the Indian Community for property damage when a ruptured hose at the store sprayed fuel over him and the passengers in his car. ***Id.*** at 380.

Obviously, Klammer and the convenience store owners did not sit down together and bargain out in writing where jurisdiction would lie and whether immunity would be waived if he should drive up to the store and have fuel sprayed on him. Thus, because it was a spontaneous inadvertent act happening on a reservation, the ***Klammer*** court felt compelled to go through an analysis of concurrent jurisdiction and comity. Our decision in ***Klammer*** points out the murky swamp that state and federal courts find themselves mired in when they attempt, in good faith, to research "appellant's version of sovereignty." The ***Klammer*** court ended up comparing identical tribal constitutional provisions of two different tribes and concluding that identical wording in the two constitutions could be interpreted two different ways. ***Id.*** at 382-83.

A semi-sovereign governmental entity is a large category including the 50 states of the United States of America and the many counties, towns, cities, school districts, etc. within a state that are also governmental entities with some limited or qualified immunity from lawsuits. All semi-sovereign governmental entities have carefully structured limited or qualified immunity to make certain discretionary decisions without fear of being sued.

All semi-sovereign tribal entities should have a right to this once their organizations, as law-abiding municipalities subject to state law, including the Minnesota Constitution, and the federal Constitution, are in place. This is the only way to give Indian people half a chance to make it to the twenty-first century.

So far, we have not seen fit to require tribal governments to abide by the United States Constitution, its Bill of Rights, and individual state constitutions. This is both morally and legally inexcusable, as it is a race-based distinction--not helping a race, but killing a race.

This is the black hole we put ourselves into as long as we avoid the hard issue of sovereignty, **which appellant has correctly framed as the real issue in this case. I respect appellant for articulating the real issue**.

Economic transactions and commercial intercourse between off-reservation entities and tribal governments is already beginning to seriously decline to the disadvantage of Indian people. Sovereignty, as now used, is causing the disintegration of tribal government credibility. This deterioration of tribal credibility is noted in federal court cases.

When faced with facts similar to ours, the Seventh Circuit Court of Appeals has refused to defer to a tribal court. ***See Altheimer & Gray v. Sioux Mfg. Corp.***, 983 F.2d 803, 815 (7th Cir. 1993) (holding that tribal exhaustion doctrine did not require stay of proceedings in federal court). In ***Altheimer***, an Illinois corporation brought suit against an Indian manufacturing corporation for breach of contract. ***Id.*** at 807. The parties

signed a letter of intent, upon which the contract was based that included a waiver and consent provision almost identical to the one in this case. ***Id.*** The ***Altheimer*** court held that it is necessary in every exhaustion rule case to examine the factual circumstances of the case "in order to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine." ***Id.*** at 814.

Significantly, the ***Altheimer*** court held that by including the waiver and consent provision in its contract, the Indian community "wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum." ***Id.*** at 815. *Altheimer* further stated:

> In the Letter of Intent, [the Indian company] explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. **To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination.** The Tribe created [the company] to enhance employment opportunities on the reservation. * * * [E]conomic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of choice of law and venue provisions, [the Indian company] may well find itself unable to compete and the Tribe's efforts to improve the reservations' economy may come to naught.

Id. (emphasis added).

A recognized exception to the normal regard for "comity" is bad faith. The requirement does not apply where

> assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or * * * where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers Union v. Crow Tribe, 471 U.S. 845, 856 n.21, 105 S. Ct. 2447, 2454 n.21 (1995) (quoting *Juidice v. Vail*, 430 U.S. 327, 338, 97 S. Ct. 1211, 1218 (1977)).

The undisputed facts here fit precisely within the "bad faith exception" to the exhaustion rule. Appellant intentionally waived sovereignty and consented to state court jurisdiction to get economic benefits from respondents. Appellant operated for two years under the contract and took the benefit of the contract. It breached the contract in 1993 and started construction of its own hotel on reservation property. Appellant's decision to breach the contract was the product of pure opportunism and not the product of any "cultural decision" to have its own hotel. At the same time its own hotel was constructed, appellant instituted its own tribal court that would be a friendly forum for appellant, which is perhaps more than a coincidence.

Now, examine the "court" that appellant insists should have the privilege of original jurisdiction, the absolute right to first look at the issues. This is the court that appellant infers could do a better job than a Minnesota district court examining the "authority, or lack thereof, of a non-Indian to waive tribal sovereign immunity." After examining appellant's brief and the tribal constitution of appellant, the remark about a non-Indian perhaps not having the authority to waive immunity is a nonargument at best, an inherently racist remark at worst. I question whether the argument is even appropriate to voice in a legal brief. In the Minnesota Court of Appeals, the Minnesota Supreme Court, and our state trial courts, each having state-wide jurisdiction, there are judges representing both genders and all four colors, red, black, yellow and white. My use of

descriptive colors is not belittling, but cultural to Native people. In Indian culture, these four colors are considered sacred, representing the four winds, the four directions, the four great races, and other symbolism. What I write about the four colors is true and culturally correct enough for analysis.

The four colors accurately describe our multi-cultural state and country. **All** "real" judges, state and federal, have the inherent power on cases that come before them to reflect on and decide the merits irrespective of their own particular race and irrespective of the race, creed or culture of litigants.

Appellant's argument about non-Indian versus Indian becomes arrogant and fatally flawed. The Lower Sioux Judicial Code itself, the one appellant wishes to control the outcome of this case, **does not even require that the judges have Indian blood to any degree**. That is not surprising. Throughout the Indian reservations in this state that have tribal courts, non-Indians, at times, have served on some or all of them. Appellant's constitution in Chapter 3 provides:

JUDGES

Section 1. *Number of Judges.*

> The Tribal Court shall have a panel of three judges, a Chief Judge and two Associate Judges, at least two of whom shall be lawyers experienced in the practice of Tribal and federal Indian law and licensed to practice in the highest court of any state. By resolution, the Lower Sioux Community Council may increase the number of Associate Judges.

There is nothing in the rest of Chapter 3 indicating that any quantum of Indian blood is needed. What the constitution and the judicial code make clear is that the reservation business council (the equivalent of a mayor and city council members) itself maintains **absolute control** over the qualifications, appointments, salaries, and hiring and firing of those who serve as tribal judges. Appellant allows a nonlawyer to be a judge. Appellant requires that the other two judges on its three-judge panels be licensed to practice in **any** of the 50 states. Thus, appellant's court claims the authority over the liberty and property of Minnesota Indians and Minnesota non-Indians alike without adhering to the slightest shred of qualification under the laws of Minnesota and the Minnesota Constitution pertaining to the appointment, qualifications, selection, and disciplining of state judges. The Minnesota Supreme Court retains to itself (as the supreme courts of most states presumably do) the final determination on who shall be allowed to take the Minnesota State Bar examination and who is qualified to be sworn in. They retain to themselves the final authority to consider the fitness of a judge, including all discipline, from mild censure up to removal from office. All lawyers and judges in Minnesota know these rules and submit to them and all other Minnesota legislation that affects our courts. Now, to the point. Neither the Minnesota Supreme Court nor the Minnesota Legislature has any authority or control whatsoever over who any tribal government chooses to call a "judge."

Appellant's Judicial Code, under "Qualifications" provides:

Section 4. *Qualifications*.

In addition to the qualification requirements in Section 1, each judge must also be 25 years or older. The following individuals may not serve the Community as judges of the Tribal Court:

(a) The Clerk of Court, Assistant Clerks, and members of the Lower Sioux Community Council;

(b) Those who have been convicted by a court of the United States or of any State of the United States for a felony, as a felony is defined by the laws of that jurisdiction or misdemeanor **within one year** immediately preceding the proposed appointment or contract as judge or justice.

(Emphasis added.)

It must be observed that since appellant claims the right to set judicial qualifications, or the lack thereof, it could, with impunity, reduce the time after conviction for a crime from twelve months down to twelve days, or do away completely with this "hinderance." It has the authority, by amendment, to do away with the requirement that two of the three tribal court judges be lawyers admitted to practice before any state. Under its version of "sovereignty" and its judicial code, three lay persons that it decides to appoint, all previously convicted of a crime, could decide the liberty and property of all state residents, Indian and non-Indian, who come before them.

Each of the eleven Minnesota reservations claims it is an individual sovereign and thus can have its own rules and its own constitutions. All eleven cite the same cases and arguments that appellant cites here to support their claim for their own "independent courts" and their own "sovereignty." Thus, it is appropriate to consider abuses on other reservations, as each of the eleven claims it would have the authority to do likewise if it so wished. They might say, "Well, we would never do that," but they would always

retain the right to change their mind under their version of "sovereignty" and do that. Just ask them.

On one reservation in this state, there is in place what I consider to be the worst individual case of abuse of judicial process, and abuse of a state citizen, that I have ever seen.

> A Red Lake ordinance allowing tribal judges to overturn jury verdicts will face its first constitutional test in a federal court's response to a habeas corpus petition by Ronald Smith.
>
> Smith was found not guilty of marijuana possession Jan. 25 by five of six Red Lake jurors. But Chief Magistrate Wanda Lyons, **citing a Red Lake ordinance passed just two weeks earlier, overturned the verdict and remanded Smith to the reservation jail, where he is currently serving a 150 day sentence**.
>
> A petition of Habeas Corpus from a prisoner requires a federal court to rule on whether that detention is in violation of the petitioner's constitutional or legal rights.
>
> Passed Jan. 9 by a nearly unanimous vote of the tribal council, Red Lake Ordinance 407.115 stipulates that "the judge in a criminal case may render a verdict contrary to that reached by the jury." Although a jury determination of guilt still requires such a finding by "all the jurors except one," the presiding judge could arbitrarily, and without explanation, set aside a guilty or not guilty verdict.
>
> Smith's brief for Habeas Corpus asserts that the law renders the jury process irrelevant. "The Tribe, by enacting Section 407.115, has clearly taken the position that its members are not entitled to a jury trial in criminal cases," states the brief prepared by Minnetonka attorney Richard Meshbesher. The attorney argues that the law is contrary to the fourth and six [sic] amendments to the U.S. Constitution, as well as a violation of the Indian Civil Rights Act's guarantee of "due process of law."
>
> Prosecutor attorney Denfield Johnson referred questions on the subject to his "bosses," the Red Lake Tribal Council. Council chairman Bobby Whitefeather and secretary Judy Roy were unavailable for comment.

Jeff Armstrong. ***Red Lake man jailed, sentenced after not guilty jury verdict***, Native American Press, Mar. 8, 1996, at 1 (emphasis added).

I have no knowledge that even in any part of the deep South between the Emancipation Proclamation in 1863 and ***Brown v. Board of Educ.***, 347 U.S. 483, 74 S. Ct. 686 (1954), in 1954, any sitting judge, trial or appellate, claimed the right in a criminal case to take a verdict of not guilty away from a jury, convict the defendant, and sentence him to imprisonment.

The outcome of the above-described travesty was that defendant's attorney brought a writ of habeas corpus in federal court and while the magistrate was taking the matter under advisement, the tribal government and its prosecutors folded and plea bargained the matter out. They knew better than to risk a full and open public hearing on the record on this issue.

The sequence of events makes it clear, by definition, that Indian tribes are not true "Sovereign Nations," but remain, as always, subject to the plenary power, and the will and complete control of Congress, and ultimately the federal judiciary. If they were truly sovereign, there would not have been a legal writ in the nearest federal court, thus denoting jurisdiction and power over the proceeding there. Neither the tribal court nor the tribe even attempted to keep the matter out of federal court on the grounds that a Minnesota federal court had no right to hear it. The deeper issue is, why such a complete lack of oversight over important constitutional guarantees on Indian reservations, an oversight to the point where this tribal ordinance was passed and actually enforced, and would still "be in force" and hidden from public view except for exposure by the press.

In Minnesota when you have successfully passed the Minnesota Bar examination and have been sworn in, your admission to the nearest federal district court and the federal system, although ceremonial, is automatic. A licensed attorney, not under some form of suspension, can go into any court in this state without fear and represent his or her client. On reservations throughout Minnesota, tribal governments have set extra qualifications over and above admission to the Minnesota Bar, have at times refused to admit licensed members of the Minnesota Bar to its tribal courts, and at times have prevented litigants in tribal court from bringing in the attorney of their own choosing. Some tribal courts in this state do not let you bring in your own attorney on family law matters, but instead give you a "court-appointed advocate" who may or may not be an attorney.

Whether advocates are attorneys or not, they are selected by tribal government. Their qualifications, or lack thereof, are set by tribal government and their hiring, salaries, and discharge are under the control of tribal government.

Recently a non-Indian woman living outside a reservation started a divorce action with her Indian spouse, who was enrolled on a reservation. She commenced a lawsuit in a proper state district court with venue and jurisdiction. He commenced his lawsuit in the tribal court. The tribal court somehow obtained jurisdiction on her divorce, including matters of child custody, and she was required to go into tribal court **without her attorney** and instead with a court-appointed advocate. Although technically the tribal court gave a version of joint legal and physical custody and visitation, etc., she has had

a tremendous hardship getting visitation off the reservation to the point where her own attorney suggested, only half in jest, that if she was on the reservation and could get her children into a car, it would be wise to speed across the reservation borders and attempt to bring the minor children within the venue of the local state district court. She and others similarly situated have faced severe obstacles in getting visitation and in the collection of child support from on-reservation obligors. Minnesota's normal legislatively-mandated enforcement provisions run into serious problems when the obligor lives and works on a Minnesota reservation. It can be noted that the off-reservation spouse can be either Indian or non-Indian; he or she will still have the same problems in reservation tribal courts when going up against a reservation resident.

It has become common knowledge throughout the state for attorneys whose clients have commercial or personal dealings with reservations that tribal courts should be avoided if possible.

There is a cruel irony in the case before us. It is that appellant would have had every single right to go into state district court and demand that its contract be honored by respondent if respondent had committed the alleged open and blatant breach. I suggest that appellant's attorney, if respondent had breached the contract, would have immediately sued the matter out in state district court, as would be his right, to ensure that his client, tribal government, would have a full and fair hearing in an independent state judicial forum with the power to grant the judgment and the power to enforce it against respondent if respondent's breach was proven.

After the courts of this state, trial and appellate, have gone out of their way to construe, on behalf of tribal government, the consent to sue and be sued clauses and waiver of jurisdiction, in favor of tribal government, here is appellant's position today. Even with a specific waiver in place that they do not deny, they refuse to willingly come into state district court to which they would have an absolute right of access if they so chose.

Indian people living on reservations know that change must come and they know they will suffer economically if change does not come, since without change, tribal government credibility will disappear. As the ***Altheimer*** court noted:

> If contracting parties cannot trust the validity of choice of law and venue provisions, [the company] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught.

983 F.2d at 815.

The recent flow of Minnesota cases, trial and appellate, have had nothing to do with cultural preservation. They have to do only with money and a tribal government's continued insistence on the right to be unaccountable to anyone, Indian or non-Indian, in any state court, unless they choose to go to state court. Otherwise they try to force parties into their own hired tribal courts.

The bulk of Minnesota cases have involved reservations with Indian gaming casinos stubbornly refusing to defend the merits of any case in state court.

It is not known to all reading this opinion that the following list of state and federal constitutional guarantees and rights are not in place for Minnesota Indians domiciled on a reservation:

> There is no guarantee that the Minnesota Constitution, the United States Constitution and its precious Bill of Rights will control. There are no guarantees that Civil Rights Acts, federal or state legislation against age discrimination, gender discrimination, etc. will be honored. There are no guarantees of the Veteran's Preference Act, no civil service classification to protect tribal government employees, no guarantees of OSHA, no guarantees of the American with Disabilities Act (1990), no guarantees of the right to unionize, no right to Minnesota's teacher tenure laws, no right to the benefit of federal and state "whistleblower" statutes, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, and no freedom of the press and no freedom of speech. In other words, all the basic human rights we take for granted, that allow us to live in dignity with our neighbors, are not guaranteed on Indian reservations under the present version of "sovereignty."

In *Tom v. Sutton*, the court stated in part:

> This holding is consistent with other judicial decisions finding the Constitution inapplicable to Indian tribes, Indian courts and Indians on the reservation.

533 F.2d 1101, 1102-03 (9th Cir. 1976).

It is ironic that every Minnesota Indian who resides one foot off a reservation, is guaranteed the benefits of the Minnesota Constitution and the United States Constitution and its Bill of Rights. It is only on eleven tiny enclaves within this state that this state's residents are deprived of due process of law and deprived of the benefits of the state and federal constitutions.

This opinion is not meant to state that every single one of the eleven reservations practices all of the above enumerated abuses. But this opinion *is* meant to state that the above enumerated abuses have taken place in at least some places and are taking place today, and any inquiry into a tribal government council as to whether they will fully honor the Minnesota Constitution and the United States Constitution is met with the same rigid response: in effect, we may or we may not, but whatever we do will be totally up to us and our "sovereignty."

Even the federal government, although it prolongs the present inept version of sovereignty, knows better. The federal government recognizes that tribal governments and reservations do not act independently, but under the will of Congress. When the federal government decides to act, it pays no attention to claims of sovereignty. Such is the case with serious felonies, such as those tried to a conclusion in 1996 involving two different northern Minnesota reservations. One of the first defenses of the defendants was that the federal district court (meaning the federal government) could not do anything about the alleged crimes and could not put the defendants in harm's way before a federal jury, because whatever was alleged to have happened, happened on a reservation and, thus, the reservation's sovereign immunity protected the defendants from accountability in federal district court.

The defense was listened to and then immediately swept away. The defendants were put on trial in federal district court in St. Paul, Minnesota. Ironically, all defendants enjoyed in federal district court an absolute guarantee to all rights mandated

under the United States Constitution, which rights they would not have been guaranteed if they had been tried in their own tribal courts. To any knowledgeable observer of tribal reservation courts and of how they are controlled by tribal government, any trial in a tribal court involving these defendants would have been a meaningless sham. You see, tribal governments, such as appellant here, claim the power to isolate and immunize themselves **even from their own tribal courts**. This is something not even a true sovereign dares do. The United States Supreme Court, not the Executive Branch, retained control over the Watergate investigation and the Nixon tapes. Indian tribal government and their advisors claim an immunity Congress does not even give to itself or the Oval Office or the federal judiciary. Nor has the Oval Office or the federal judiciary ever claimed for itself total immunity. No person in this country is totally free of a possible federal indictment for misuse or abuse of the public trust or for misfeasance and nonfeasance. President Ford granted to former President Richard Nixon an unconditional pardon for possible acts committed while in the Oval Office. Ford did not grant Nixon the pardon because Nixon had total sovereign immunity for acts committed while in the Oval Office; Ford granted Nixon the pardon because he did not.

Appellant's Judicial Code in Chapter II entitled "Jurisdiction" in Section 3(a) provides:

> Section 3. ***Suits Against the Tribe.***
>
> (a) *Sovereign Immunity of Tribe*. The sovereign immunity from suit of the Tribe and every elected Lower Sioux Community Council member or tribal official with respect to any action taken in an

> official capacity or in the exercise of the official powers of any such office, in any court, federal, state or **tribal** is hereby affirmed; nothing in this Code, with the exception of subsection (d) of this section, shall constitute a valid waiver of the Tribe's sovereign immunity. **The Tribal Court shall have no jurisdiction over any suit brought against the Tribe** in the absence of an unequivocally expressed waiver of that immunity by the Lower Sioux Community Council.

(Bold emphasis added.)

In Section 3(d), respondent waives its own sovereign immunity and consents to the tribal court hearing the suit, **just** for the limited purpose of determining "the eligibility of Tribal members for per capita payments made pursuant to a Lower Sioux Community in Minnesota Tribal plan to distribute funds from Tribal Gaming enterprises."

> Respondent, Granite Valley, is a group of individuals being threatened with the possible deprivation of their property by tribal judges over whom they have absolutely no input. Why is this startling, even profound? The answer is that it exists nowhere else in this country.

The partners in respondent and all members of the Lower Sioux Community have, as they should, the right of a direct vote on all state district court judges in their judicial district, all intermediate appellate judges in this state, and all members of the Minnesota Supreme Court. All of the partners in respondent and the members of the Lower Sioux Community enjoy a direct voice in the election of state representatives, senate constitutional officers, and the governor. They therefore have a direct vote over those by whom they will be governed, and a direct vote for governor, which is an indirect vote for the state judges that a governor appoints.

In the federal system, both Indians and non-Indians enjoy a direct vote for United States senators and, through the electoral college, an indirect vote for the president . Thus, although federal judges do not submit to direct election, Indians and non-Indians, as American citizens, can vote for those who control the appointment of federal judges, *i.e.*, the President and members of the United States Senate. Conversely, the partners in respondent have absolutely no input into the selection or appointment of tribal judges.

Ironically, the northern Minnesota defendants who stood trial in St. Paul federal district court enjoyed a number of constitutional guarantees that would not have been guaranteed in their own reservation tribal courts. They enjoyed constitutional guarantees to the right to pick the best possible criminal defense attorney they could afford. They were able to afford some of the finest in Minnesota.

If they had pleaded poverty, they would have been assigned one of the many excellent federal court public defenders. They enjoyed a constitutional guarantee to a trial by a jury. They enjoyed a constitutional guarantee to a trial conducted by an independent and neutral federal judge, a federal judge enjoying objective qualifications for that post. They enjoyed a constitutional guarantee to an orderly and thorough appellate court process up to the United States Supreme Court, all before independent, neutral, and qualified judges.

The defendants enjoyed, as they would not have done in tribal courts, a constitutional guarantee to the right of a not guilty verdict by the jury on whatever count or counts the jury found the prosecutor did not prove beyond a reasonable doubt. Of the

multiple counts against all defendants, some defendants had more than others. The two different federal juries returned some counts of not guilty. The federal trial judge took no further action on the not guilty counts. The federal prosecutor did not request any. Those not guilty verdicts stand forever.

The two sets of federal criminal cases to which I have referred, and to which it is proper to refer, as they are part of an open public judicial record, are not about anything more, tragically, but greed.

As a former criminal defense attorney for 17 years, both in private practice and as a part-time public defender, and as an appellate judge for 13 years, I have a deep appreciation for the difference between pretrial allegations, in either criminal complaints or indictments, and what is later proven, or found to be unproven, after a full trial. Routinely, pretrial allegations, no matter how strongly stated, result in not guilty verdicts in state and federal courts. On some occasions, pretrial allegations are found not only to not be proven by a reasonable doubt; at times the evidence at trial may show the pretrial allegations to be nearly or totally unfounded.

But after a full and fair jury trial in state or federal court, and after a jury has rendered a verdict of guilty by proof beyond a reasonable doubt, the highest standard in any case in any court in this country, those convictions stand as an open public record that the defendants, after having been given their constitutional right to a fair trial, were found guilty by proof beyond a reasonable doubt.

In the two sets of trials involving Northern Minnesota reservation tribal council members and advisors, the pretrial allegations included multiple counts of:

> conspiracy to defraud the United States/misapplication of tribal funds; embezzlement; interstate commerce/money laundering; civil rights conspiracy; mail fraud; conspiracy scheme to defraud the United States; theft/misapplication of tribal funds--aiding and abetting; theft involving program receiving federal funds; scheme to defraud; aiding and abetting.

At the conclusion of the two lengthy trials involving multiple defendants, the verdicts of guilty included:

> conspiracy to defraud the United States/misapplication of tribal funds; embezzlement; interstate commerce/money laundering; civil rights conspiracy; mail fraud; conspiracy scheme to defraud the United States; theft/misapplication of tribal funds--aiding and abetting; theft involving program receiving federal funds; scheme to defraud; aiding and abetting.

Thus, two of eleven, or close to 20 percent of all tribal governments in Minnesota, were found to contain systemic and institutionalized corruption, and the evil that corruption brings. The evidence at trial revealed that this systemic and institutionalized mismanagement stemmed from unaccountable casino money. The unaccountability stems directly from the lack of state and federal oversight. That lack of oversight is directly attributable to tribal "sovereignty." The investigation of other Minnesota reservations with gaming casinos continues today.

This mismanagement is a direct result of the "myth of sovereignty" protecting tribal leaders and tribal government from the normal rules of federal and state accountability. It has been noticed by Indian and non-Indian leaders alike.

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Fairbanks, after looking back at these sets of trials and after examining the present situation on Indian reservations, recently stated:

> ***The Minnesota Chippewa Tribe in 1997: A new beginning, or the beginning of the end?***
>
> 1996 was a benchmark year in the history of the Minnesota Chippewa Tribe due to federal felony convictions of longtime political leaders at Leech Lake and White Earth Reservations. * * *
>
> More than just revealing **far-reaching and entrenched corruption in tribal government**, the convictions and post-conviction events at Leech Lack and White Earth reservations and within the Tribal Executive Committee of the Minnesota Chippewa Tribe **expose the fragility of the tribe's claim to sovereignty**. The tribal body politic, if some measure of sovereignty is to be preserved, can no longer afford to ignore the wrongdoing of their political leaders.
>
> **Political Aftermath**
>
> At Leech Lake the convictions did little to rid tribal government of the clutches of unscrupulous tribal officials. * * * To stymie * * * reform efforts, they have held numerous illegal tribal council meetings, passed illicit legislation and wasted untold amounts on attorney fees. The result

has been governmental chaos and an **expose of the depth of corruption** in Leech Lake government.

* * * *

Furthermore, the action, or more correctly the lack of reaction, of the Minnesota Chippewa Tribe Tribal Executive Committee to the federal convictions of four of its members * * * **suggests tribal corruption extends beyond those convicted.** * * *

[T]he nonfeasance of the executive committee **reveals a pervasive political ethic of criminality within the leadership of the Minnesota Chippewa Tribe.** It is, indeed, remarkable that at their federal sentencing hearing [convicted tribal officials] refused to accept personal responsibility for their wrongdoing. Instead, they chose to blame others for their downfall, including the disingenuous argument that the federal government was at fault. They argued that the federal government was responsible because it created the business committees and, therefore, made it possible for them to lie, cheat and steal. By making this silly argument, they revealed their lack of character and personal criminal ethic.

* * * *

Sovereignty Endangered

The Minnesota Ojibwe will soon learn that the American people will not tolerate, and continue to finance, such political bungling. The post-conviction political events, coupled with the fact that the Minnesota Ojibwe have lost almost all their land and very few remember the Ojibwe language, argue strongly for the conclusion that the Leech Lake and White Earth Ojibwe, and other similarly situated Minnesota Chippewa Tribe reservations, **do not possess the capacity of sovereign political personalities.** In fact, they are in grave danger of losing the scintilla of government they have remaining.

* * * *

However, before any significant constitutional reform can be achieved, the Minnesota Chippewa Tribe body politic must accept the fact that **the tribe lacks any reasonable measure of inherent sovereignty.** In fact and law, the tribe is a creation of the federal government under the Indian Reorganization Act of 1934 and can be abolished by the plenary authority of Congress at any time. The federal government, of course, can insidiously decide and quodlibet to the contrary by merely reducing, or eliminating, federal funding of tribal programs. **Denying political reality will not foster constructive constitutional reform.**

Robert A. Fairbanks, ***The Minnesota Chippewa Tribe in 1997: A new beginning, or the beginning of the end?***, Native American Press, Dec. 27, 1996, at 6 (emphasis added).

I recognize that two out of eleven is a small sampling to draw hard and fast conclusions from. But I will also state, on the other hand, that if in a small, sparsely populated county in Minnesota, approximately 20 percent of the mayors and city councils in cities in that county went through a trial that determined theft, fraud, kickbacks, swindle, corruption, and vote rigging had been in place in those towns for years, it goes without saying that the citizens of those towns, the area legislative representatives, the state attorney general's office, and the state auditor's office would set their teeth and grimly determine to find out how those conditions existed for so long.

You see, the guilty verdicts in those two sets of trials were not about a single act or two of spontaneous theft or embezzlement. The guilty verdicts were not about in-state residents defrauding out-of-state strangers over the telephone. Rather, the evidence and the guilty counts showed a pattern of years and years of corruption, and the evidence forming the basis for the convictions proved beyond a reasonable doubt that defendants were stealing from **their own people**.

All persons found guilty are and remain human beings, brothers and sisters to the rest of the state. The unaccountability they took advantage of is a direct result of the presently held view of "sovereignty," a view that denies to state officials the right to investigate, protect, and regulate their own citizens living on Minnesota reservations.

All elected officials, state and federal, executive, legislative, and judicial, must shoulder their respective share of the shame stemming from the institutionalized neglect of Indian people. Due process and justice demand an immediate move toward formulating sound public policy to ensure this never happens again.

We have stretched the law, contorted it, and tortured it to promote the view of "sovereignty" that tribal governments or reservation business councils want as "the law." This has taken us to depths that could not be fathomed for any other racial, ethnic, or cultural group in this country.

The case of ***Cabazon Band of Mission Indians v. County of Riverside***, 783 F.2d 900 (9th Cir. 1986), which needs to be read thoroughly, not just cited, and then thoroughly understood, is puzzling. Carried to its logical extreme, it could be renamed "The Indian Gaming and Reservation Nonaccountability Act." Briefly, the Cabazon Band resides in California. California for years had various forms of gambling, but under control of its state legislature and its state courts. If the *Cabazon* court had said that if California Indian people were being prevented by reason of their race from participating in California's regulated forms of gambling, that is constitutionally improper, it would be a wonderful and clear decision and the court could have stopped there. But the *Cabazon* court went on to expand and give the *Cabazon* tribe gambling unregulated by the State of California. *Id.* at 903. Unregulated gambling is a type of gambling the State of California **never gives to its own residents**.

When Cabazon members gamble off the reservation, state regulations apply. When they gamble on their reservation, state regulations do not. Yet the Cabazon band members are residents of California in both places.

Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1 (1831), and its progeny, like ***Cabazon***, further increase the isolationism and the red apartheid that is now separating American Indian people from all other cultures and races. That apartheid cannot be justified on the grounds that lack of accountability and "self-determination" and "self- governance" is good for Indian people, and thus, we will close our eyes to constitutional improprieties. The lack of state and federal constitutional guarantees make today's life on reservations intolerable to Indian people who are not on the good side of the reservation business council; they have no practical recourse to state or federal courts when they are on the "bad side." They have learned about their own "tribal courts."

Cherokee Nation needs our attention because it is the seminal case defining Indian tribes as "domestic dependent nations" and describing their relationship to the United States as "that of a ward to his guardian." The majority opinion delivered by Chief Justice John Marshall describes the issue:

> This bill is brought by the Cherokee Nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State, which as it is alleged, *go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them* by the United States in solemn treaties repeatedly made and still in force.

30 U.S. (5 Pet.) at 15 (emphasis added).

The Supreme Court sets out the standing of the United States to its Indian people, and discusses how "they look to our government for protection."

> Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

Id. at 17.

The Supreme court then points out that *if* they wanted to hear the petition of the Cherokees, it would certainly be a great idea for the Court to address the listed grievances.

> If the courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.

Id. at 15.

Among the listed bill of particulars by the Cherokees, including a claim that the State of Georgia was unilaterally breaching previously signed treaties, taking the Cherokee's land, and expelling them out of the state, one specific bill of particular is remarkable. It is remarkable because petitioner Cherokee Nation set out, with no dispute, that one of their members had been sentenced to death by hanging by the State of Georgia, and after the Chief Justice of the Supreme Court signed a "writ of error" forbidding the execution, the State of Georgia went ahead and executed Corn Tassel, Georgia stating that "this was no business of the Supreme Court of the United States."

> The individual called in that bill Corn Tassel, and mentioned as having been arrested in the Cherokee territory under process issued under the laws of Georgia, has been actually hung, in defiance of a writ of error

> allowed by the Chief Justice of this court to the final sentence of the court of Georgia in his case. That writ of error having been received by the governor of the State was, as the complainants are informed and believe, immediately communicated by him to the Legislature of the State, then in session; who promptly resolved, in substance, that the Supreme Court of the United States had no jurisdiction over the subject, and advised the immediate execution of the prisoner under the sentence of the State court, which accordingly took place.

Id. at 12-13.

This listed "grievance" is remarkable because I cannot find at any time in any of our 50 states that a state execution has ever taken place in direct defiance of the United States Supreme Court. It is also remarkable that from the opinion it is apparent the Supreme Court acted no further against the State of Georgia, rather than to note what happened.

The majority opinion further discusses in detail how Indian tribes are not the equivalent of a foreign Sovereign Nation.

> [Y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.

Id. at 17.

Then the majority concludes with the holding of the case, which is, that if wrongs had been afflicted, and if even greater wrongs for Indian people are on the horizon, the Supreme Court is not able to lend a hand at this time.

> If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

Id. at 20.

Cherokee Nation is a real case and it sets out two important truths. The first truth is that on the narrow legal issue of whether federally-recognized tribes are the equivalent of a true Sovereign Nation like Canada or Mexico, it is clear that they are not. All of ***Cherokee Nation***'s progeny, from the date of its release to 1997, continue to reiterate that Indian tribes are under the will and defeasance of Congress and that Congress has total "plenary power" over tribes.

The second truth to be taken from ***Cherokee Nation*** is that from that day to today, the federal government has engaged in a failed Indian policy; partial failure at times and total failure at others, but *always* a failure, because both before and after 1924 when the American Indian was finally accepted as an American citizen, the American Indian has never been extended all the rights, privileges, and obligations of statehood and American citizenship. Right today, the rights, privileges, and obligations of the Constitution of the State of Minnesota and the U. S. Constitution are not guaranteed to Indian people domiciled within the boundaries of Minnesota's Indian reservations.

In attempting to reconcile the different descriptions of Indian tribes in the many federal cases that, like ***Cabazon***, at times carelessly use the terms "sovereignty," "semi-sovereignty," "domestic dependent nation," and "ward of the government" interchangeably, hard-working trial judges and appellate judges throughout this state are now caught in a cross-fire, with everyone struggling to do the right thing.

Clear example. Cases are starting to flood our courts over which driving laws and safety statutes of the State of Minnesota can be enforced on Indian reservations. That has broken down into near illogical subgroupings, such as: severity of transgression; those living on reservations; those driving onto reservations from the outside; those driving from reservations on to public roads, etc. These contorted subgroupings are sucking us into the black swamp of internal inconsistency.

I am describing the "criminal/prohibitory" dichotomy versus the "civil/regulatory" analysis laid out in ***State v. Jackson***, ___ N.W.2d ___, No. C8-96-1668, 1997 WL 18304 (Minn. App. Jan. 21, 1997); ***State v. Stone***, ___ N.W.2d ___, No. C9-96-1291, 1996 WL 721562 (Minn. App. Dec. 17, 1996); ***Bray v. Commissioner of Pub. Safety***, 555 N.W.2d 757, 760 (Minn. App. 1996). All three panels have struggled to do the right thing, some finding that certain illegal driving conduct is civil/regulatory and some finding that certain illegal driving conduct is criminal/prohibitory.

With no other race, creed, or culture would we spend a minute struggling to find distinctions that do not exist on an issue so serious as the right of state residents, Indian and non-Indian alike, to expect that all other drivers they meet are bound by our state's motor vehicle safety laws.

Here is the simple honest answer: The State of Minnesota does not regulate drunken driving, it prohibits it. The State of Minnesota does not regulate speeding, reckless driving, or careless driving, it prohibits them. The State of Minnesota does not regulate driving without insurance or driving without up-to-date registration and current

license plates, it prohibits them. The State of Minnesota does not regulate driving without a license, it prohibits it. The State of Minnesota does not regulate failure to have a child restraint, it prohibits it.

The State of Minnesota regulates **legal** conduct. It prohibits **illegal** conduct. Clear example. A highway with a posted speed limit of 55 miles per hour. The state regulates driving conduct up to 55 miles per hour. That is legal conduct. Over 55 miles per hour you are not regulated, you are prohibited. If on that road the county or the state is doing some work and establishes a construction zone with a sign that says "temporary speed limit 40 miles per hour," legal driving conduct up to 40 miles per hour is regulated. Driving conduct over 40 miles per hour is no longer regulated, it is prohibited. The state regulates driving with the minimum amount of liability insurance, 30/60. If you have that or more, you are legal and you are regulated. If you have less than 30/60 limits, or none at all, that driving conduct is not regulated, it is prohibited.

Everyone in the judiciary tries its best to be ethical and fair. The inconsistent swamp we are in is a direct result of incongruous spinoffs of "tribal sovereignty" and "tribal immunity."

The cases coming before the court on the issue of sovereignty are coming from Minnesota's eleven Indian reservations. Appellant has placed sovereignty in issue. I have accepted appellant's request to address sovereignty. Appellant's attorney has every ethical right to promote his client's interests and to put at issue whatever he feels he must

do to protect his client's interests. I have an obligation to give the attorney and his client my answer and my legal analysis.

It is helpful to start with the status of Minnesota's eleven recognized reservations, seven Anishinabe/Ojibwe, and four Dakota Sioux. Although they range in size from under 100 acres in southern Minnesota to thousands of acres in northern Minnesota, they contain as residents an extremely small percentage of our population. The most recent figures available show approximately 12,000 Indian people spread out in those eleven different reservations. The four Dakota Sioux are small in size and small in number. Their combined residency is about 1500. The other approximate 10,500 Minnesota Indians living on reservations are spread out among the seven northern Minnesota Ojibwe reservations. Actual populations on reservations range from under 200 to perhaps 3,000. There are a total of approximately 60,000 identified American Indians in the State of Minnesota. The other approximate 48,000 do not domicile on a reservation but reside in all other parts of the state where the Minnesota Constitution and the United States Constitution, with its Bill of Rights, control their rights and privileges and their obligations. *If they go back to the reservation, they are stripped of those guarantees. If they leave the reservation again, those guarantees come back to protect them.*

The eleven reservations have a total of 17 exclusive gaming franchises, including 16 Las Vegas style casinos, some large, some small, and one bingo franchise. Because there is no open meeting law, because there is no freedom of the press, because there is no forum to change that, Indian casino interests keep the total gambling revenues on

Indian reservations hidden as much as possible from tribal enrollees and from the public eye.

Although the actual figures are kept hidden by the reservation business council and their casino managers, we know from various sources, shop talk, publications, and comparisons to known figures from regular casinos of similar size, that the money pouring into the 17 Minnesota Indian gaming franchises is substantial.

It can be said that their combined "handle" is between 2.5 and 3 billion dollars annually. "Handle" or "drop" is the total amount wagered. Then we know that the range of cash back or payout to customers is within the range of 80 percent to 90 percent of that amount. Thus, the amount of cash retained by the casinos called gross profit would be approximately 250 million to 300 million at 10 percent in retainage, and 500 million to 600 million at 20 percent retainage. That figure represents gross profit, a rather loose term, but a sufficient one for these computations. Then from gross profit must be subtracted the costs of doing business to arrive at the net profit. Well-managed gaming casinos historically enjoy an excellent ratio of net profit to gross profit. That, simply and with no further explanation, explains the billions and billions of dollars poured into Las Vegas style casinos in Nevada, in New Jersey, and now in Indian casinos dotting this country since the 1940s. The net profit margin can be as much as 50 percent. Thus, simple arithmetic from the above range of gross profits shows a possible combined net to the 17 franchises of some 100 to 200 million dollars on up through 250 to 300 million per year. That is a lot of money.

South Minneapolis, between Franklin and Lake Street, has one of the largest urban Indian populations in this country. They belong primarily to Minnesota's Dakota and Ojibwe reservations. They know nothing of these figures. Some may receive a small pittance; most receive nothing. Their life is a struggle for survival. They do not know of, much less discuss, ***Cherokee Nation***, 30 U.S. (5 Pet.) 1, ***Lone Wolf v. Hitchcock***, 187 U.S. 553, 23 S. Ct. 216 (1903), ***Cabazon***, 783 F.2d 900, ***Gavle vs. Little Six, Inc.***, 555 N.W.2d 284 (Minn. 1996), etc. They are mostly concerned with getting through the day, getting enough to eat, and having a warm place to sleep. They assume that social justice for Indian people, like all important matters, is somehow handled by men and women in tailored suits going quietly to and fro in the executive, legislative, and judicial branches, talking about important things with each other in marbled halls and paneled chambers.

There are people out there on reservation business councils, and their advisors, intimately connected to the management of that tribe's casinos, who know far more than I the truth and accuracy of my approximations. Anyone wishing to come forward in a public forum and on a public record and correct me as to whether I am high or conservative would provide a relief to me and to Indian people. Then all would know the exact figures. All city residents with a well-managed and state-regulated municipal business entity know exactly how much belongs to them. This is simple and can be done. It occurs, dozens of times, hundreds of times per year in this state, as all cities, villages, unincorporated townships, etc. maintain carefully calculated and open financial records

for the residents and all appropriate state agencies that are entitled to examine those records. It is done by employing, as a normal cost of doing business, an outside and fully objective and independent major accounting firm to do a complete and thorough certified financial statement.

In Minnesota, like in other states, whether you are a for-profit corporation, a nonprofit corporation, or a municipal corporation running a business entity, you are subject to applicable state and federal laws and regulations. That ensures accountability of the owners, investors, managers, officials, and residents of the towns involved. The one exception in Minnesota is tribal government. Yet in Minnesota, all members of a tribe, whether living on or off the reservation, are full-blown Minnesota residents and American citizens.

For now, fair and full public disclosure of casino and other tribal government proceeds is denied to all Minnesota Indians, whether they are off-reservation enrollees or reside right on the reservation 100 yards away from the casino that they are told "belongs to them."

If in Minnesota, eleven small towns totalling approximately 12,000 residents had within them 17 different gaming casinos, all would be well in those towns. With state regulation and the laws controlling a municipality's accounting for its revenues, I suggest city planners from towns in Minnesota and other states would make yearly pilgrimages to those casino towns to get city planning and lifestyle ideas. Instead, we have a situation on our eleven reservations where there is still poverty, illiteracy, inadequate medical care,

crime, violence, alcohol abuse, drug abuse, domestic abuse, sexual and physical assaults, lawlessness, incest, and all the other societal ills that plague small towns and large cities.

On Minnesota reservations, even those with the potential for vast revenues, there is a "poverty of the spirit" that no amount of money can salve. ***See*** Mark Aamot, ***Greed vs. Culture?***, The Circle, Feb. 1996, at 5. The article refers to the reservation the smallest in size, but the richest in revenues, the Shakopee Dakota Community with its Mystic Lake Casino. The article details how on a reservation with the most lucrative casino, culture and togetherness get drowned in the fight for control over the money.

My concurrence is decidedly not anti-casino gambling and for those who have read my dissent in ***Cohen***, 543 N.W.2d at 382-408, they will know this is true. What I am pointing out is the tragic mismanagement of what should be a legitimate bonanza for Minnesota Indians, previously impoverished for decades. **This tragic mismanagement flows directly from the failed governmental Indian policy of "sovereignty."** The simple but institutionalized change which is necessary, and must be done quickly, is for the federal congress, federal judiciary, state legislatures, and state courts in some fashion to confer full rights of statehood on residents of Indian reservations. When the casinos are located within a Minnesota municipality with all the attendant rules and regulations and open government laws required by that designation, the people will be guaranteed the right to know what those proceeds are. The way it is today, they do not, and are deliberately kept in the dark by the reservation business councils and casino managers.

There are many examples in Minnesota of the proper handling of money by municipalities. For decades, municipalities have owned municipal liquor stores, waste and sewer treatment plants, public utilities, garbage disposal companies, and other businesses. There is nothing wrong with a Minnesota municipality making money at a municipally-owned enterprise. Properly accounted-for dollars help the quality of life by supporting needed services without adding to the tax load.

Even though there are significant gaming revenues, Minnesota and federal taxpayers still are asked to supply to Minnesota reservations with such things as HUD housing, Bureau of Indian Affairs-financed reservation schools, Indian Health Service, AFDC benefits to those who qualify, and other benefits. Each of the above-enumerated uses of taxpayer funds for appropriations for people living on reservations is ethical and appropriate. The people living on reservations share exactly the same class as myself, all readers of this opinion and all residents of this state. The class is Minnesota residents and United States citizens. It has always been permissible to target groups within this state that need legitimate financial aid and then give it to them.

But the gambling money must be accounted for. That is so in Minnesota towns and villages; that is so on federal enclaves, of which Indian reservations are a type. For instance, on military reservations, the profits, whether lucrative or modest, from commissaries, post exchange stores, etc. are subject to rules, regulations, and accounting. The budget of Congress and the Oval Office is a public record.

The majority of Indian casinos in Minnesota and in this country have failed to comply with the federal gaming act which is supposed to regulate them.

> This week the National Indian Gaming Commission (NIGC) released a copy of the Report to the Secretary of the Interior on Compliance With the Indian Gaming Regulatory Act (IGRA) by the nation's tribal casinos. The Report, which was dated September 30, 1996, found that only 32 of the country's 274 tribal gaming operations complied with all eight requirements of the IGRA.
>
> As far as Minnesota is concerned, the Report found that only six of the state's 16 tribal casinos were in full compliance with the Act

William J. Lawrence, ***Most Casinos in state, U.S. failed to comply with federal gaming act***, Native American Press, Dec. 20, 1996, at 4.

Appellant here, Jackpot Junction, is included on the lengthy list of tribal gaming operations not in compliance. This article stated:

> The Report cited the 11 other tribal casinos for the following violations:
>
> Jackpot Junction Casino, owned and operated by the Lower Sioux Indian Community, for failure to be licensed by the tribe and for failure to submit audits to NIGC * * * .

Id.

Thirty-two out of 274 is not even enough Indian gaming casinos in compliance in this country to construct an accurate model of how it should be done right!

The following truth must be noted. The hundreds of millions of dollars per year generated by the casinos are not even split fairly among the approximate 60,000 Indian people in this state. Only a tiny few of the 48,000 off-reservation enrollees ever share in any per capita distribution by the reservation business council of net gambling

proceeds. Those tiny few off-reservation enrollees who share only got their share after finding themselves pitted against their own tribal leaders who resisted such sharing, and after bitter struggles in federal court. Other than those tiny few, the approximate 48,000 off-reservation but bona fide enrollees get nothing from the proceeds of their tribes' casino income.

What happened to the gross and net revenues from those 17 gambling franchises that I described above? The answer lies in the two previously-described sets of trials from northern Minnesota reservations with casinos. Those casinos were "managed" under the presently held view of "sovereignty." Thus, the total unaccountability and the resulting criminal convictions happened. The results of those criminal trials will forever stand as a public record in mute testimony to the utter failure of present American Indian policy.

Those trials had tragic results for all state residents, Indian and non-Indian alike. There is no triumph, only sadness, in my description of what happened. But federal trials are a matter of public record, open to all, and judicial opinions rightfully can refer to public documents when appropriate.

It is only the "intelligentsia" that Einstein referred to that neither understand nor accept the truth in Indian country. As I previously stated, tribal government leaders, their advisors, and the casino managers know far better than I or anyone else the true figures as to the flow of money. Tribal governments know that the "winds of change are coming." The two sets of previously-described public trials, together with the intensive

investigation preceding them, have put tribal governments on notice that the end of total unaccountability to their own people is coming.

There are four distinct sets of outrage. The first outrage belongs to Indian people living on reservations. They have no state or federal constitutional guarantees, no open records as to casino money, no state regulated open and honest elections, no Minnesota state auditor, no secretary of state, and no state attorney general to look over the shoulder of government leaders as is done in all other Minnesota towns.

The second outrage belongs to Indian people enrolled in a tribe but living off of the reservation. They are often ineligible to run for tribal government office, they have no guarantee that their absentee ballots are counted correctly, they have to fight for a piece of the per capita distribution or get none at all, and they have no input in how the tribal government spends money on their reservation.

The third outrage belongs to state residents, Indian or non-Indian, who cannot walk onto a reservation and feel safe on any part of the reservation, including, but not limited to, the gaming casino because city, county, and state law enforcement authorities are hamstrung most of the time, and forbidden some of the time, from even attempting to enforce state laws that promote the safety and welfare of people on reservations. State residents, Indian or non-Indian, cannot even sue a tribal casino for serious injuries that the plaintiffs claim were caused by the casino's neglect.

The fourth outrage belongs to Minnesota and American taxpayers who are expected to fork out millions of tax dollars a year for various support services for people living on

Indian reservations and then are denied the normal accounting we get from state government and the federal government as to annual budgets.

To further add to the misery of Indian people, rightfully entitled to a fair accounting of gross and net profits from their casinos, but not getting it, is the growing probability that when Minnesotans and others who gamble fully realize the total lack of protection they have once they step inside a casino, the number of those coming to gamble will decline. Then the casinos will begin to sink financially and may eventually close. The specter of competition is here.

Clear example. Assume that the State of Minnesota authorized a Minnesota municipality or a private group of investors to build a large and comfortable Las Vegas style casino somewhere in central Minnesota or in the Twin City metropolitan area. It is a matter of public record that for the last few years various state legislators have discussed openly whether there should be state-based or privately-owned gaming in direct competition with reservation casinos. No one can discount this possibility.

Now assume that after state and region-wide publicity, this new Minnesota casino opened, and as eager and curious patrons came through the front door on opening day, they were met by a huge, neatly lettered, painted sign above the door with individual paper copies for all who entered. Assume the sign above the door said the following:

ACCOUNTABLE CASINO

Welcome to Minnesota's first and only accountable casino. The management hereby makes the following pledge to all customers, all

employees, and all individuals and business entities that do business with us:

We understand that we are subject to the United States Constitution, its Bill of Rights, the Minnesota Constitution, and all lawfully passed Minnesota, state and local, legislation or ordinances that affect our right to do business. We agree to be bound by state and federal laws, including without limitation, civil rights acts, laws protecting veteran's preference, OSHA, social security withholdings, workers' compensation, laws against age, race, color, and gender discrimination, zoning ordinances, labor rights to attempt unionization, and all other such matters.

We reserve the right to vigorously defend on the merits any charge against us or our employees wherein it is claimed we are civilly or criminally liable. But we understand fully and accept that we are under the lawful jurisdiction of all law enforcement agencies. That includes, without limitation, city police, county sheriffs, the resident county attorney, the attorney general of the State of Minnesota, and all other agencies and sub-agencies of the State of Minnesota that regulate business enterprises, including those of this type.

We fully understand and agree to unqualifiedly submit to the jurisdiction of Minnesota state district courts and its appellate process, and Minnesota federal district courts and their appellate process when state or federal issues arise. We reserve the right to any and all legitimate defenses, including without limitation the normal qualified immunity involving discretionary decisions of duly elected council members. We reserve the right to attempt to move causes of action wherein we are sued from state court to federal court or from federal court to state court if our attorneys advise us that we should do that to protect our interests. But we agree that we are required to defend on the merits in either a state and federal court.

We pledge not to take money from this casino and set up a system wherein we set the qualifications for and control the selection of "judges" paid by us to entertain lawsuits by others against us.

Our defenses to lawsuits will include, without limitation, defenses on the merits on such matters as statutes of limitation, collateral estoppel, laches, etc.

It is our intention to make a fair profit from this casino for our shareholders if we are privately owned, and for residents of this municipality if we are a municipal corporation. But we will not do so at the expense of your dignity and rights. We will not cheapen our own by so doing. If we are a privately-owned casino, our books will be open to the appropriate taxing authorities, state and federal, and all income taxes, excise taxes, sales taxes, etc. collected will be paid to the appropriate authorities. If we are a municipally-owned business, we understand that we are subject to open meeting laws, freedom of the press, display of all of our public records to our residents at appropriate times, and all other laws regulating municipally-owned businesses.

We accept the authority of the State of Minnesota, through its State Auditor, to examine our books as required.

We accept the authority of the State of Minnesota, through its Secretary of State, to monitor and regulate our municipal elections so that all qualified voters have their votes counted fairly.

If there are any allegations against us, civil or criminal, we reserve the right to hire attorneys to defend us. But we understand there will be an independent judicial forum for the respective claims and defenses to be heard.

If the above were the case, it would not be long before the seventeen Indian gaming franchises would suffer financial distress, and then close, one by one.

There is nothing "anti-casino" in what I say. I am "anti-anything" that runs to the detriment of the people it is supposed to serve. If there are to be Indian gaming casinos or other tribal business enterprises, I am for healthy, regulated, accountable casinos and other businesses run by properly elected public officials, under Minnesota state laws regulating municipalities. Nothing bad can happen from the change that I suggest must come, meaning the change from "federal tribal enclaves" to Minnesota municipal towns, villages, or cities, whatever form is chosen. The present existing gaming casinos have

"grandfather" rights. It is just that the gaming casinos need to be operated like all other municipally-owned business entities, open, accountable, and subject to Minnesota's laws on open meetings and open public records.

The foundation of the myth of sovereignty and its concomitant evils is that the **federal government has never entrusted American Indian people with the ownership of reservation land**. This is unlike any other race, color, or ethnicity. It is time. Reservation residents must be given the right of ownership in fee simple. Since 99 percent plus of Americans have this right, the tiny percentage of Americans living on reservation land are being discriminated against to the full extent of the law. There is somewhere between perhaps 600,000 to 900,000 Indian people in this country actually living on the 554 scattered federally-recognized reservations. All Indian people living off the reservation can own land in fee absolute. A tribal government can do little or nothing without the approval of a federal agency, some arm of the federal government. Indian people, generally, living on a reservation cannot. This prohibition applies whether it is called reservation land, trust land, or allotted land. It may be "deemed to be the tribe's," but it lacks the pure ownership indicia of fee simple absolute.

This will take federal congressional action and the guidance of the federal judiciary, but I am setting out the reasons why it has to be considered, and considered quickly.

All municipal governments in this state and country own land, as do their residents, in fee simple. Many municipalities have valuable land, including but not

limited to lake front property, riverfront property, commercial land suitable for private investors to buy and develop, etc.

The *Cherokee Nation* nineteenth century, antiquated, questionable, and patronizing "government/ward status" continues to keep Indian people on reservations in a tribal state of dependency on either state and federal handouts or expansion of the increasingly unaccountable gambling. ***See Cherokee Nation***, 30 U.S. (1 Pet.) at 17 (noting that tribes' "relation to the United States resembles that of a ward to its guardian").

Give them their land! Without ownership, there is no chance of attracting home owners and businesses.

If Indian reservations are reorganized as standard Minnesota cities and towns, the flight of Indian people off their reservations to the "free part" of the state will be halted, and hopefully reversed. Today, 75 percent to 80 percent of all enrollees in Minnesota have turned their back on reservation life because of tribal politics, unaccountability, institutionalized nepotism, and fear. On the other hand, as a normally regulated town under Minnesota laws and Minnesota courts, professional and white collar people of Indian descent might consider moving back to the reservation. Now, because of the inability to buy or build a home, because of the questionable quality of reservation schools, because of the total lack of job security (even for those hired by tribal government as advisors), because of the lack of a stable state-regulated police force, even those pretending to adhere to the security blanket of "sovereignty," choose not to live as

permanent residents on the reservation. If you ask them point blank, "Why not?" their moment of awkward silence will be the truth.

When you examine the status of Indian people today, it is clear that even after the 1924 passage of what can be called the American Indian Citizenship Act, *see* Act of June 2, 1924, 43 Stat. 253, now codified at 8 U.S.C. § 1401(b) (1994), acceptance of American Indian people as individuals, endowed with every right to individually demand the benefits of a state constitution and the federal constitution, **has never been granted by the United States Congress or mandated by the United States Supreme Court**.

Under the pretense of "sovereignty," we deny Indians living on reservations the most basic rights given all other Americans, the right to own land and the rights, privileges, and obligations of state constitutions and the federal constitution. Instead, the federal government holds reservation land "in trust" on behalf of the Indians. *Oklahoma Tax Comm'n v. Texas*, 336 U.S. 342, 355, 69 S. Ct. 561, 568-69 (1949) (stating that the "allotted Indian lands held in trust by the United States [are] 'an instrumentality employed by the United States for the benefit and control of this **dependent race**.'") (citation omitted, emphasis added.)

Many Indian reservations in this country are small. Some consist of a few hundred acres or less. Some consist of a few thousand acres. A few reservations, particularly in the western states, comprise a few hundred thousand acres or more. The Navajo reservation, occupying parts of two states, New Mexico and Arizona, and the Crow reservation in Montana would be two examples of our larger reservations. We need not

be afraid to give these tribes and their people land ownership of hundreds of thousands of acres in fee absolute. If the reservation boundaries contain that much land now, all that means is that before various federal agencies, and the U. S. War Department, acting under the control of Congress, stole Indian land and then set the reservation boundaries, the Indian people thereon owned millions of acres! When we established reservation boundaries and forced Indian people within those boundaries, we always downsized their former holdings, we never "upgraded."

The present reservation system **preserves isolationism and red apartheid**. From 1619, when the first slaver hit America's eastern shores, until 1863, when Lincoln proclaimed the Emancipation Proclamation, we had slavery, pure and simple. But after emancipation and quick passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, no thought was given to appropriating lands from the defeated South and handing them over to American blacks and telling them to set up their own "plantations/reservations," where as long as they stayed within the borders they could pretty much do what they wanted, pretty much elect who they wanted to, and those elected could pretty much do what they wanted to anybody within the boundaries.

We did not force now full-fledged American black citizens onto "plantations/reservations." But both **before and after 1924** and passage of the American Indian Citizenship Act, we forced Native people to live on reservation/plantations to enjoy the benefit of "sovereignty." We say to no other race, color, or culture, "you are free to leave the reservation and step into the free part of the state where the state

constitution is in force, but the second you step back across the line, state and federal constitutional guarantees, and the right to own your own land, disappear."

America's history is replete with both subliminal and overt nonacceptance of Indian people. *See* "Indian Wars of the Nineteenth Century." By my use of the word "nonacceptance," those living who were involved in a direct or peripheral way with the legal analysis leading to ***Brown v. Board of Education,*** (and anyone studying the history of that case) will recall that the nonacceptance of colored children in all white schools was testified to at length in various public records as being so dysfunctional, so destructive of normal hoped-for emotional adolescent growth patterns, that by starting with the emotional and psychological sickness suffered by colored children, the grown-ups finally said, "there ought to be a law against it." 347 U.S. at 483, 74 S. Ct. at 686.

They should have paid attention to the little children far earlier. These same patterns of arrested development and psychological disability from nonacceptance plagues not just the young, but all Indian people domiciled on reservations.

As we pushed westward in the 1900s and took over Indian land and called it federal territories, then accepted those territories as states, after referendums, all persons in that former territory had a right to be a resident of that state, all **except the Indian people** who, during the westward push, had been physically herded onto reservations.

As residents of any county in Minnesota, off-reservation enrollees have far more self-determination" and "self-governance" than anyone living on an Indian reservation. Indian reservations are subject to the "will and defeasance of Congress." They are

subject to the "plenary power" of Congress. Off-reservation enrollees and other Americans are not so subject. The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

U.S. Const. amend. X.

Today, Indian reservations are nothing more than thinly disguised federal enclave "plantation/reservations." Freedom as a state resident and as an American protected by the Tenth Amendment lies off the reservation, not on it.

Off-reservation tribal enrollees can buy and sell a home, buy and sell a business, own land, mortgage it, vote for city, county, and state officials, knowing that the secretary of state monitors those elections. They can demand to review public records at appropriate times. If they feel aggrieved on any cause, the nearest Minnesota district court with venue and jurisdiction will entertain their claim. **They must prove it, but they will have a forum to entertain their claim.**

When the State of Minnesota had virtual sovereign immunity, the Minnesota Supreme Court, at least at that time, had the good sense of social justice to insist that the legislature waive it for legitimate claims of their citizens. In ***Spanel v. Mounds View Sch. Dist. No. 621***, the court stated that it was

> unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims against school districts, municipal corporations, and other subdivisions of government on

> whom immunity has been conferred by judicial decision arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims. However, we do not suggest that discretionary as distinguished from ministerial activities, or judicial, quasi-judicial, legislative, or quasi-legislative functions may not continue to have the benefit of the rule. Nor is it our purpose to abolish sovereign immunity as to the state itself.

264 Minn. 279, 292-93, 118 N.W.2d 795, 803 (1962).

The *Spanel* court characterized the doctrine of sovereign immunity as "archaic" and stated that it would overrule it as a defense with regard to tort claims brought against school districts, municipal corporations, and other subdivisions of government on whom immunity was conferred by judicial decision, arising after the 1963 Minnesota Legislature adjourned, subject to any statute presently, or subsequently limiting or regulating prosecution of such claims. *Id.*

If the doctrine of sovereign tort immunity is archaic as to a state of 4.6 million residents, it is even more archaic to eleven tiny scattered enclaves with a total of approximately 12,000 state citizens living on them. The changeover, from unregulated reservations to Minnesota towns and municipalities, will cause no damage whatsoever to the right of tribal government to continue to make the decision necessary to serve their residents. All Minnesota municipal entities, from the state itself on down to city councils, towns, school districts, etc., share a limited immunity for purposes of those discretionary decisions needed to make and implement sound public policy. *See* Minn. Stat. § 446.03, subd. 6 (1996) (excepting municipalities from tort liability against "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary

function or duty, whether or not the discretion is abused"); ***see also Waste Recovery Coop. v. County of Hennepin***, 504 N.W.2d 220, 230 (Minn. App. 1993) (noting that "discretionary function immunity protects a governmental act that 'involves a balancing of policy objectives'") (citation omitted).

When they become municipalities, Indian reservations, like all Minnesota towns, will enjoy the same rights, privileges and obligations as do every other governmental entity in this state. But for now they stand out as a glaring exception to the maxim that no person or entity "is above the law."

Gavle, 555 N.W.2d 284, is the law and we have to deal with that. Between 1834 and the Emancipation Proclamation, which went into effect on January 1, 1863, ***Dred Scott v. Sandford***, 60 U.S. (19 How.) 393 (1886), was the law and we had to deal with that. Between January 1, 1863, and ***Brown v. Board of Education***, 347 U.S. 483, 74 S. Ct. 686, in the fall of 1954, black apartheid was the law and we had to deal with that. Thus, it is permissible to explain existing law to explore its ramifications and see whether appropriate changes should be considered.

The complaint in ***Gavle*** is a public record and thus can be reviewed by all. The complaint is a 25-page document carefully detailing allegations including, but not limited to, physical abuse, sexual abuse, coercion, terroristic threats, job loss, impregnation, and other alleged abuses. The complaint contains carefully-detailed allegations that several of the claimed torts took place on Mystic Lake Casino property with the knowledge and consent, and at times the aiding and abetting, of casino employees. If you substitute for

the named defendant and the tribal corporation in *Gavle*, the governor, attorney general, any constitutional officer, any sitting judge, any state senator, or any member of the house of representatives, and the state agency that employs them, the plaintiff would have a forum to attempt to keep both the defendant and the governmental entity in as a co-defendant. The plaintiff would have an acknowledged uphill battle. There is far more red tape in suing a governmental entity than in suing an individual. This red tape has a legitimate purpose. Governmental entities in Minnesota (and elsewhere) are clothed with a carefully crafted limited or qualified semi-sovereign immunity from certain types of acts. *See* Minn. Stat. § 446.03, subd 6 (1996) (listing specific instances where a municipality may be shielded from tort liability). Discretionary/ministerial, official immunity, discretionary immunity, common law immunity are known examples of how a governmental entity can be shielded from a lawsuit either started against itself alone or when the entity is named as a co-defendant. But in recognition of the need for social justice for its citizens, carefully crafted exceptions are built into the law to allow a plaintiff a due process opportunity to crack the veil of sovereignty. *Spanel* sets out the sound reasoning and logic. 264 Minn. at 292-93, 118 N.W.2d at 803. The point is, no plaintiff in this state is denied a forum to at least argue that they should have a chance to prove they qualify for one of the recognized exceptions. The Gavles of the world are denied an independent forum when the defendant is an Indian reservation's tribal government or their "business arm," a gaming casino.

Between the 1834 release of ***Dred Scott*** and the 1863 Emancipation Proclamation (followed quickly by the Thirteenth, Fourteenth and Fifteenth Amendments, to complete the concept that no one can be enslaved), slavery as an acceptable American institution, with its attendant evils too numerous to mention, was unexplainable if the goal of the judicial system is justice. In that time frame, slavery was legal; but it remained unexplainable.

Between 1896 and 1954, state-sanctioned black apartheid (the ***Plessy v. Ferguson***, 163 U.S. 537, 16 S. Ct. 1138 (1896) (Harlan, J., dissenting), separate but equal doctrine), with its attendant evils too numerous to mention, was unexplainable if the goal of the judicial system is justice. In that time frame, black apartheid for states that so chose to practice it was legal; but it remained unexplainable.

Today, the result in ***Gavle*** is unexplainable if the goal of the judicial system is justice. It is legal, based on "sovereignty," with its attendant evils of lack of state and federal constitutional guarantees; its attendant evil of unaccountability; but it remains unexplainable.

If the goal of the judicial system is not justice, then the judicial system becomes unexplainable.

I recognize that justice is guaranteed to no one; but can we consciously, as human beings, deny other human beings the first step, a legal forum, to attempt to invoke justice?

Normally, Minnesota does not leave plaintiffs suing a governmental entity "hanging out to dry" from the outset of a case by stating, "we do not care what your claim of proof may be. You are not entitled to a forum to voice it against us. Go pursue the individual. It is none of our concern."

The City of Minneapolis for the last few years has been hit with a series of lawsuits alleging excessive force by their police officers. The City vigorously defends on the merits. They use every available defense, including their limited sovereign immunity, but they never start the lawsuit by stating, "this is between the plaintiff and the police officer. Whatever the two of you end up doing is your own business."

Minneapolis stands behind the officer with its financial assets. If the plaintiff obtains a judgment against the officer and/or the City of Minneapolis, the City of Minneapolis and its taxpayers honor their commitment. They pay their just debt.

The case before us is about a semi-sovereign tribal government that does not even wish to appear in a state court to present a defense.

I use the term "semi-sovereign" to describe Indian reservations and their tribal government, the reservation business councils. Thus, I need to take some time now and attack a myth, a myth that, like a sighting of "Elvis," you can squelch and bury, but that is resurrected when somehow, somewhere, another individual claims that he has seen "Elvis."

The "Elvis sighting" is a stubborn belief of some individuals, some of the "intelligentsia," that each Minnesota Indian reservation is like a true Sovereign Nation,

"a nation within a nation." The backup argument is that members of a reservation enjoy "dual citizenship," dual as in citizens of the United States of America, and citizens of some equivalent foreign independent nation, an Indian tribe.

I can only point out again that none of the normal attributes of a true sovereign nation or a true independent foreign country has ever been attributed to our federally-recognized Indian tribes.

> Real sovereignty includes, without limitation, the right to seal one's borders, declare war, make peace, coin one's own currency, design and distribute one s own postage stamps, nationalize essential industries such as radio, telephone, communications, steel, oil nationalize industries belonging to foreigners, control immigration, set quotas, forbid emigration, apply for a seat in the United Nations, etc.

Cohen v. Little Six, Inc., 543 N.W.2d 376, 386 (Minn. App. 1996) (Randall, J., dissenting), *aff'd* (Minn. Jan. 21, 1997).

Gavle contained the most recent pronouncement of the Minnesota Supreme Court on this issue of whether tribes are true sovereign nations. *Gavle* laid that myth to rest. In pertinent part, *Gavle* stated. "Because we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity." *Id.* at 292.

First of all, no Minnesota state court would have any jurisdiction over a claim by, for instance, residents of Canada against the Canadian government, a true sovereign nation. Then *Gavle* goes on to say, "It is settled law that tribes have the privilege of sovereign immunity, granted to them by Congress, and existing at the sufferance of

Congress." *Id.* (citing *Rice v. Rehner*, 463 U.S. 713, 719, 103 S. Ct. 3291, 3296 (1983) (emphasis added)).

All federal cases on this issue have repeated the settled law that tribes are under the will, defeasance, and sufferance of Congress.

Decided in 1831, *Cherokee Nation*, the seminal case on "sovereignty" from which all other relevant cases flow, provides in part:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a **ward to his guardian**.

30 U.S. (5 Pet.) at 16 (emphasis added).

> Actually, *Cherokee Nation* sets the record straight. The case sets out unequivocally that Indian tribes are not true sovereign states or nations. *Cherokee Nation* labelled the tribes "domestic dependent nations." *Id.* at 17. *Cherokee Nation* is accurate when it uses the term "domestic" as, by definition, American Indian tribes are in the U.S., not a foreign country. *Cherokee Nation* is totally accurate when it uses the term "dependent."

Cohen, 543 N.W.2d at 385.

The status of Indian tribes as "sovereign" is purely an artificial creation of Congress. It exists only at the sufferance of Congress and is subject to complete defeasance. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086 (1978). In other words, Congress may completely eliminate tribal immunity. Recently, the

Supreme Court confirmed that "Congress has always been at liberty to dispense with such tribal immunity or to limit it." ***Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe***, 498 U. S. 505, 510, 111 S. Ct. 905, 910 (1991).

Lone Wolf, 187 U.S. 553, 23 S. Ct. 216, on treaties is instructive. *Lone Wolf* states, in part:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Id. at 566, 23 S. Ct. at 221.

Lone Wolf repeats, not the sovereign status of Indians, but their dependent status:

> In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.
>
> * * * *
>
> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States.

Id. at 565-67, 23 S. Ct. at 221-22 (citations omitted).

Lone Wolf also puts to rest any idea that the land beneath reservations is not United States soil, but rather, is land belonging to a foreign or sovereign nation:

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derive title from the Indians.

Id. at 565, 23 S. Ct at 221.

Preceding *Lone Wolf*, we had *Ward v. Race Horse*, 163 U.S. 504, 16 S. Ct. 1076 (1896), telling us:

> That 'a treaty may supersede a prior act of congress, and an act of congress supersede a prior treaty.' is elementary. * * * In the last case it was held that a law of congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty.

Id. at 511, 16 S. Ct. at 1078 (citations omitted).

Lone Wolf and *Race Horse* tell the truth.

Thus, when federal and state court cases carelessly use the term "sovereign immunity" without taking the time to point out that it is a limited sovereign immunity, limited by Congress, which can eliminate and abrogate it totally if it so chooses, they keep alive the "myth of sovereignty."

A governmental entity calling itself a "Sovereign Nation," that concedes it is under the will of a higher governmental entity, is not sovereign, but dependent and semi-sovereign. Put another way, "Indian sovereignty" is a classic legal oxymoron.

> We are still haunted by John Marshall's brilliant, evasive compromise, whose definition of Indian tribes as "domestic dependent nations" bequeathed a contradiction in terms that continues to confuse our thinking about Native Americans to the present day.

Fergus M. Bordewich, ***Killing the White Man's Indian***, at 338 (1996).

What failed federal governmental Indian policy has done is give reservation business councils absolute power when it should only be limited power in line with the limited power of other mayors and city councils within this state.

A last example, if one need be given, was draft resistance by American Indians based on their version of "sovereignty."

As I stated in ***Cohen***:

> During World War II and the Vietnam War, a test of sovereignty presented itself. Essentially, American Indians raised the issue of whether they were citizens of the U.S. subject to the draft or whether they were sovereign or quasi-sovereign inhabitants of a sovereign or quasi-sovereign reservation and, thus, not subject to the draft. The federal courts listened politely and then ruled immediately that American Indians were U.S. citizens subject to the draft. ***See, e.g., United States v. Rosebear***, 500 F.2d 1102 (8th Cir. 1974) (holding that induction of Indian, who was United States citizen within the meaning of the Selective Service Act, is not precluded from military service by quasi-sovereignty of Indian nations, lack of full citizenship by Indian people, or treaty commitments); ***Williams v. United States***, 406 F.2d 704 (9th Cir. 1969), ***cert. denied*** 394 U.S. 959, 89 S Ct. 1307 (1969) (holding member of Western Shoshone Nation of Indians subject to Universal Military Training and Service Act and not exempt by Treaty between the United States and Western Shoshone); ***Ex Parte Green***, 123 F.2d 862 (2d. Cir. 1941) (holding that even if treaty status between U.S. and Indian tribe were valid, Congressional action superseded the treaties and made tribe member a citizen for purposes of WWII military service); ***United States v. Cook***, 383 F.Supp 353 (N.D.N.Y. 1974) (holding that appellant was subject to Military Service Act of 1967 even though a member of Six Nations of Indians). * * *

> Sovereignty is a phrase we have mouthed for over 200 years, but this country has never, at any time, treated Indian tribes with any of the courtesy, nor respect accorded a true sovereign state or nation, such as a Canada, Mexico, Great Britain, etc. None of the normal attributes of a true sovereign nation or foreign county has ever been gifted to, or attributed to, Indian tribes. Real sovereignty includes, without limitation, the right to seal one's borders, declare war, make peace, coin one's own currency, design and distribute one's own postage stamps, nationalize essential industries such as radio, telephone, communications, steel, oil, nationalize industries belonging to foreigners, control immigration, set quotas, forbid emigration, apply for a seat in the United Nations, etc.

Cohen, 543 N.W.2d at 384, 386.

As stated by Ralph K. Andrist in ***The Long Death: The Last Days of the Plains Indian***, 246 n.* (1993):

> Actually, there was no writing of treaties with Indian tribes after 1871, when the entire ridiculous pretense that tribes were sovereignties was abolished. It would be pleasant to be able to report that the change was made because common sense prevailed, but such was not the case.

In a 1996 American Indian Law Review article, Robert A. Fairbanks stated in pertinent part:

> [R]eservation casinos -- the alleged economic salvation of the Native American peoples -- are subject to extensive federal regulations and reluctant state acquiescence. Given federal plenary power, Native American self-determination and sovereignty are illusory.
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> * * * *
>
> The various Native American nations negotiated and executed over three hundred treaties with the United States of America before Congress declared in March 1871 that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty
>
> * * * * "

Robert A. Fairbanks. ***Native American Sovereignty and Treaty Rights: Are They Historical Illusions?***, 20 American Indian L. Rev. 141, 142, 146 (1996).

What the federal government has failed to do with their dependent wards is set up a structure for Indian people that will give them a chance to live in peace and to have the full input into their city council's government and the full force of the state constitution of the state they live in to enforce their rights, both under that state's constitution, and the United States Constitution. That structure is full statehood, meaning entitlement to all the rights, privileges and obligations of being a state resident. That can be accomplished by going through the needed legislation to turn Indian reservations into towns and cities. Many reservations in this country are "checker-boarded." There is some private land within the reservation borders which is owned by an Indian or a non-Indian. Nothing changes for those already holding private ownership. They will simply be residents of a state town within a state county within a state.

To have true dual citizenship, you need two independent Sovereign Nations, such as the United States and Canada, England, or France. American Indian people only have citizenship in one true sovereign, the United States of America. Their other "citizenship" is as a dependent ward of Congress when they live on a reservation or other tribal land. In this ward-like status, they do not even enjoy the state's rights that they do the minute they leave the reservation. In reality, reservation-domiciled Native people have one citizenship, American. The other "citizenship" is a black hole containing only a lack of

rights, not rights. If you want to give American Indians freedom, give them full statehood. They are "somewhat familiar with being residents of federal enclaves."

As a parallel, the City of Washington, D.C. is a type of federal enclave, like federally-recognized Indian reservations. It is under the power of Congress. It does elect its own mayor and city council members, and they, like all other municipal officials, have the previously described limited or qualified sovereignty in their municipal decision making. But an independent "Sovereign Nation" it is not. Indian tribes are not independent "Sovereign Nations." The residents of the District of Columbia and Congress and any person in this country with a cursory knowledge of the town understands that.

> the District of Columbia, a unique federal enclave over which 'Congress has * * * entire control * * * for every purpose of government.' ***Kendall v. United States***, 12 Pet., 524, 619 (1838). * * * Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative. This is a power that is clearly possessed by Congress only in limited geographic areas.

Northern Pipeline Const. v. Marathon Pipe Line Co., 458 U.S. 50, 75-76, 102 S. Ct. 2858, 2874 (1982).

Yet "enlightened" elected state and federal officials continue to deny the true status of Indian tribes. Why do they insist on putting on the blinders? The answer is, it is a subliminal patronizing racism and they use it to distance themselves from truly accepting Indian people as full-fledged state residents and citizens of the United States of America.

America and Minnesota were in bloody warfare with the American Indian people throughout the entire nineteenth century and parts of the seventeenth and sixteenth centuries. (*See* Dakota Conflict, 1862). The conflict on reservations today is "warfare" between those who want accountability and the protection of state constitutions and the protection of the federal constitution, and those who want to preserve the status quo, since they hold the reins of tribal government and the purse from the windowless counting rooms of Indian casinos.

For those who wish to continue to pretend that the 554 federally-recognized Indian reservations in this country are separate independent "nations within a nation," I can only point out the obvious. Does that mean to our present 100 senators we add 1108 and several hundred more to the house of representatives? Do we add 554 more state militia or national guards? One recently convicted tribal official on his way to federal prison stated that by the twenty-first century he expected that each tribe should be able to apply to the United Nations for recognition as a foreign nation. That would give the United States not one, but a total of 555 votes in the United Nations. Does anyone really take serious the notion that within the borders of the United States, there are the equivalent of 554 downsized versions of Andorra, Benin, Gabon, Micronesia, Samoa, etc., and some of the other "postage stamp" size countries that have sovereign independence and a vote in the United Nations.

If you want to "Balkanize" this country on the basis of race, culture, and ethnicity, then you should spend some time on the north/south Ireland border, in Israel/Palestine,

in India/Pakistan, in Russia/Chechnya, and particularly in Slovenia, Croatia, Serbia, Bosnia, Herzigovena. In former Yugoslavia, just shut up and just listen. Let the dead speak to you before you make your final decision. Go if you want, fight, shed your blood, die if you must. If you survive, then come back and tell us how unifying it is for the United States of America, with its 50 states, to have within our borders 554 tiny "nations within a nation," each claiming their version of "sovereignty" and their version of an "independent tribal court."

In the Time essay for December 30, 1996, Charles Krauthammer observed:

> It is possible that with time our mania for identity politics too will fade, perhaps shamed and deterred by the example of such Balkanized wrecks as Bosnia and Rwanda.

Charles Krauthammer, ***Alger and O.J.***, Time, Dec. 30, 1997, at 174.

I agree with the various cases that rationally discuss Indian reservation semi-sovereignty in terms of an issue that needs Congress's attention. But I am tired of blaming the intolerable situation on Minnesota reservations entirely on the federal government. The federal government shares the blame, but states are not helpless as to their own citizens. I am tired of having to name someone as an oppressor every time there is a victim. I am tired of the insufferable politically correct culture of the 1990s which strangles us as a state, and prevents us from addressing the thorny issue of discrimination openly and honestly.

The fifty semi-sovereign states in our federal union are not helpless.

Under the Minnesota Constitution we can give our citizens more rights than under the federal constitution. We simply cannot give less. All states have the same privilege.

A few years ago, the Minnesota Supreme Court gave the old order Amish in Minnesota greater religious freedom than required by the U. S. Constitution. We know that because the Minnesota Supreme Court in ***State v. Hershberger***, 444 N.W.2d 282, 289 (Minn. 1989) (***Hershberger I***) specifically exempted the Amish in Minnesota from displaying slow-moving vehicle signs on their buggies (statute requiring display of slow-moving vehicle emblem violated freedom of conscience rights protected by Minnesota Constitution when statute was applied to Amish defendants, who held sincere religious belief against use of emblem, where state failed to demonstrate that both freedom of conscience and public safety could not be achieved through alternative means of Amish defendants' use of white reflective tape and lighted red lantern).

Following ***Hershberger I***, the State of Minnesota successfully petitioned the United States Supreme Court for certiorari. The United States Supreme Court remanded *Hershberger* to the Minnesota Supreme Court with a terse message and a cite to one of its original cases. ***Minnesota v. Hershberger***, 495 U.S. 901, 110 S. Ct. 1918 (1990) (***Hershberger II***) (citing ***Employment Div. v. Smith***, 494 U.S. 872, 110 S. Ct. 1595 (1990)).

When you read ***Smith***, it is clear the Supreme Court's message was "Minnesota, rethink how much religious freedom over and above what this court would grant that you should grant." The Minnesota Supreme Court, at least at that time, said "tough," and

they wrote ***Hershberger III***, preserving the right of old order Amish under the Minnesota Constitution to a greater degree of religious freedom than the Supreme Court felt appropriate. ***State v. Hershberger***, 462 N.W.2d 393, 398 (Minn. 1990).

None of us can do everything, but each of us can do at least something. Minnesota has a right to look to its own state constitution, to see that the rights of its residents living on reservations have at least the same rights as **Minnesota Indians not living on the reservation**. One of the rights all Minnesotans enjoy is the right following a not guilty verdict in a criminal trial to be forever freed from a "judge" who claims the power to set aside a defendant's verdict of not guilty, render a verdict of guilty, and imprison the defendant.

The federal government not only need not fear state regulation of Indian people and Indian tribes, but must recognize that it is the only way to give Indian tribes true freedom and the constitutional benefits of the Tenth Amendment to the Bill of Rights.

As federal wards since ***Cherokee Nation***, they have had their entire country, we call it America, stolen from them by us or bought by us with inconsequential money as a result of mostly unconscionable treaties. The push from the east coast to the west coast was not impeded by the federal judiciary (I can only assume that state judges then felt as helpless as some seem to feel today). The death of Indian people from outright war and genocide, coupled with white man's diseases such as small pox, cholera, whooping cough (diphtheria), and others amounted to millions of Indian people. At one point around the turn of the twentieth century, Indian people came close to extinction.

The federal government and the federal courts cannot possibly micromanage the lives and rights of the 12,000 Indian people in Minnesota living on reservations, nor the others in the other 553 reservations. The sordid history of Indian people from 1787 through 1997 proves that issue. On the other hand, the 75 percent to 80 percent of Indian people who do not live on reservations but live in the free part of their home state have, since 1787, enjoyed all the rights of the United States Constitution and all the rights of the respective state constitutions. The federal government does not micromanage that group, which is the vast majority of American Indian people. The federal government allows them to live as all the rest of us do, as citizens of their respective states.

The federal courts are incapable of micromanaging Indian people on reservations. They do not get involved in the bread and butter legal issues that about 95 percent of life is all about. You see, whether Indian or non-Indian, original federal court jurisdiction over the issues of state residents is fairly rare. Federal courts do not handle divorces, adoptions, family custody, probate matters, buying and selling of homes and businesses, intrastate commerce of business (except bankruptcy), the enforcement of state traffic statutes, and totally state-related crime, and the multitude of other matters that state courts handle. If state courts did not handle the daily lives of its residents, the federal court system would sink under the case load in weeks.

The federal government and the federal courts **always** retain the right to look over the shoulder of the state courts and state legislatures. The federal courts are there to ensure that state constitutions give as many rights as, or more than, the United States

Constitution and do not attempt to give less. The federal courts are there to look over the shoulder, for instance, of a state correctional system and put it "on paper" when extraordinary measures are needed. But the only true freedom for Indian people will be when the federal government and the federal courts require state legislatures and state courts to take over the regulation of Indian reservations, just like states regulate all towns and cities within their borders. State legislatures and state courts today are required to regulate the lives of the 99 percent of the citizens in America who do not live on Indian reservations, and that number includes most Indian people.

We fought the Civil war, or the War Between the States, to free black citizens from having to live on plantations. We did not fight the bloodiest war in this country's history to force black Americans onto plantations. Yet today, we have a "reservation system" for American citizens where state and federal constitutional guarantees are not in place, as they were not in place on plantations prior to 1863.

How did we arrive at the above-mentioned anomalies, inconsistencies, injustices, and unaccountability in Minnesota, a state that prides itself on social justice and equality for all?

Part of the answer lies in what has been described as "the noble savage mentality." The Native American Press recently predicted the resistance of the "noble savage mentality crowd" to removal of the "veil" of tribal sovereign immunity:

> Depending upon your perspective in the Native community, Judge Randall's dissent in the Cohen case is either the best or worst thing that could have happened to Indian tribal government since the landing of

Columbus back in 1492. Due to the potential magnitude of the impact of this dissent to the current concept of Indian tribal sovereignty we have decided to carry it verbatim on pages 2, 5, 8, 9 and 10 of this edition.

In his 69 page (legal) dissent, Judge Randall traces the origin and historical evolution of the concept of Indian tribal sovereignty. He calls it "more illusion than real, a Potemkin Village, mush when it was written and mush today and a throw back to the Separate but Equal doctrine, struck down in 1954, by the U.S. Supreme Court in Brown v. Board of Education."

For a judicial document, the dissent is interesting, thorough, well written and even eloquent at times. It reveals a writer well versed in Indian law, Indian history and Indian culture. For its intrusion into near sacred tribal ground, it is not without sensitivity and appears to come from the author's heart rather than from any vendetta.

This piercing of, or perhaps more appropriately the great ripping in, the veil of tribal sovereign immunity by Judge Randall was long overdue. It will certainly not go unchallenged by tribal officials, the Indian bar, the noble savage mentality crowd and the others benefiting from the charade.

It is high time that those in these groups are not allowed to hide their criminal conduct, their lack of accountability, their denying us our civil rights, their incompetence and their other exploitations and greed behind this anachronism of the 17th century.

Perhaps, the only major point that Judge Randall missed in his dissent is the fact that over 75 percent of the Indian people in Minnesota today do not live on reservations and have in effect already rejected the concept of sovereignty as currently practiced in our tribal governments.

It wasn't too may moons ago that several of us in this column predicted that the greed generated by the so called return of the New Buffalo (gaming) would hasten the demise of tribal sovereignty and seriously erode what was left of our native culture.

Thanks, Judge Randall, for being the first to have the courage to stand up and be counted and give us back our dignity. For it is time that we shed the guardian/wardship relationship with the federal government and become as you say it, real Americans.

William J. Lawrence, ***Thanks Judge Randall for giving us back our dignity***, Native American Press, Mar. 1, 1996, at 4.

Well-meaning individuals with the "noble savage mentality" fall prey to the charade that people residing on reservations are somehow primitive unspoiled children of nature, and when you visit them, like when you visit the Minnesota Zoo and view endangered species in an enclosed atmosphere, you are warned about bringing any contamination into that closed sphere so that nothing will disturb the precious ecological system. The "contamination" that so far has been prevented from "contaminating" Indian reservations is the Minnesota Constitution, the United States Constitution, the Bill of Rights, and all of the previously cited state and federal rights we take for granted.

The reference to "noble savage mentality" is not meant to be critical of any judicial brethren who think differently from myself. Rather, it is to point out the historically obvious, that when serious explosive issues of social justice and human rights are involved, courts differ. Justice Harlan, the lone dissenter in ***Plessy v. Ferguson***, stated about his colleagues:

> *In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.*

163 U.S. 537, 559, 16 S. Ct. 1138, 1146 (1896) (Harlan, J., dissenting).

Analogies are proper forms of communication, often persuasive, and in Justice Harlan's case, compelling. I like Justice Harlan's position in 1896. I like mine today.

Justice Harlan suffered through 58 years of being thought wrong by most of his colleagues. In 1954, the United States Supreme Court gave Justice Harlan his life back

through ***Brown v. Board of Education***, which laid to rest the notion that a nation and its people could live in peace and harmony with the different races classified, then isolated, and then called "separate but equal."

This entire issue of "sovereignty" rests on **true red apartheid**. The American Indian will never be accepted in this state, in this country, until we recognize this "red apartheid" for what it really is, a pancake makeup cover-up of *Plessy*. 163 U.S. at 551, 16 S. Ct. at 1143 (holding that "equal but separate [railroad] accommodations for the white and colored races" was constitutional). No further cite, other than *Plessy*, is needed. I can only note, "Haven't we learned anything?" To get around ***Brown v. Board of Education*** and to accomplish the agenda of keeping American Indian people, at least while on reservations, dependant wards of the United States Government, legal writers from time to time have attempted to classify American Indians, not as a racial class, but as a "political class."

Morton v. Mancari attempts to sidestep the bitter truth that Indian sovereignty is a race-based classification by stating that it is not race based, but is rather a "politically based difference." 417 U.S. 535, 553 n.24, 94 S. Ct. 2474, 2484 n.24 (1974) (stating that preferences for American Indians are not racial, but political, when the preferences apply to members of federally-recognized tribes).

The reader need only to walk through this classification and apply your own common sense and judgment to see its inherent fatal inconsistency. With four generally recognized races, red, yellow, black, and white, why is red, the American Indian, called

a "political class?" If the federally-recognized American Indian is truly a political class, and not a racial class, it means, by definition, that all state and federal laws and all civil rights acts forbidding racial discrimination **no longer protect Indian people**. Since they are not a "race," they cannot come under the protection of laws forbidding racial discrimination. When this is thought through, and its implications made clear, I suggest those legal writers are going to say the equivalent of "Oops, we misspoke." What we meant to say is they are **both** a racial class for purposes of protecting them from racial discrimination, as all American citizens are, and a 'political class' for purposes of job preference and life on a reservation. Now why are only Indian people both race based and politically based? The other three races comprising 99 percent of America are not.

Assume an Ojibwe, or Sioux, or Cherokee, an enrolled member of a federally-recognized tribe, has a job with the State of Minnesota in one of its many political divisions or agencies. Then assume that person, whether in a classified or unclassified position, is fired **solely** (job performance is not involved) because that person is an Indian. Assume that person brings a lawsuit citing federal and state antidiscrimination acts and the Minnesota Human Rights Act. Minn. Stat. § 363.01-.20 (1996). Assume the attorney for the defendant agency sails into court and makes a motion for summary judgment on the grounds that under ***Morton v. Mancari*** and its progeny, federally-recognized Indian people have now been unidentified as a race and, therefore, the Minnesota Human Rights Act, and other like laws, does not protect them. I would hope that the defense attorney has negotiated for a straight hourly fee contract and not a

retainer contingent upon success. *If you are not going to inject truth into this debate, get out of the debate.*

Ironically, the only place in the State of Minnesota where there is blatant and intentional civil rights violations and blatant and intentional discrimination with impunity is on Indian reservations and in their gaming casinos. The Minneapolis Star Tribune, as part of a lengthy front-page story, stated in pertinent part:

> They can't get hearings on the merits of their cases. The commission tells them it typically cannot enforce U.S. civil-rights laws in tribal casinos. And federal judges tell people they must take their cases to tribal court.
>
> State judges and the Human Rights Department deliver similar messages.
>
> Until last year department officials believed they had enough leverage to persuade tribes in some cases to settle complaints. But that leverage ended when the Minnesota Supreme Court ruled in November that Jill Gavle, a former Mystic Lake employee, couldn't sue the casino alleging sexual harassment.
>
> "That court decision makes it pretty clear that we don't have jurisdiction to force a casino to do anything," said Ken Nickolai, acting deputy director of the Human Rights Department.
>
> **"If they want to tell you to take a hike, they can,"** said John Gibson, *an enforcement officer* for the department.

Pat Doyle. ***Today's Focus: Casinos and civil rights***, Star Tribune, Jan. 28, 1997, at 1 (emphasis added).

We have been warned before about the fatal inconsistencies between the American Indian Citizenship Act of 1924 and the post-1924 preservation of the reservation system with its so-called "sovereignty." ***See*** Theodore W. Taylor, ***Commentary on "Tentative Final Report" of the American Indian Policy Review Commission***, Apr. 18, 1977, and

the *Separate Dissenting Views of Congressman Lloyd Meeds, D-Wash., Vice Chairman of the American Indian Policy Review Commission*.

I use the term "herd" not lightly, but after careful thought. Native people are forced to live on a reservation "if they want to enjoy all the wonderful benefits of sovereignty," which some seem to think is for their betterment. So the second they move off the reservation, they are not entitled to this "betterment." Minnesota off-reservation Indians are forced "to suffer the slings and arrows of the Minnesota Constitution, the federal constitution, and its Bill of Rights."

When you study the history of reservations, it becomes clear that the wiser and the more courageous the Indian leader, the more he fought being herded onto a reservation for himself and his people. Chief Joseph (Nez Perce), Quanah Parker (Comanche), Geronimo (Apache), and Sitting Bull and Crazy Horse (Lakota Sioux) were the last of the proud warrior chiefs to be forced onto reservations. If reservation life on federal enclaves was so great, would they not have clamored to get on, rather than fight and shed blood to stay off?

Today, an ugly reason for the bitter, divisive battle to preserve the status quo on reservations with economic development, principally Indian gaming casinos, is the growing flow of thousands and thousands of dollars by tribal government and its casino interests into the coffers of state and national candidates, and both national parties, Democrat and Republican.

Is this relevant in a judicial opinion? It is. It relates directly to sovereignty. I will quote from recognized independent newspapers. Newspapers, like scholarly journals, like treatises, like published books, like sociological studies in ***Brown v. Board of Education***, have a legitimate place in legal opinions.

The Wall Street Journal broke the story on July 12, 1996 in ***Midwest Indian Tribes Flex Washington Muscle In Successful Drive to Sink Rival Gaming Project***, by staff reporters Jill Abramson and Glenn R. Simpson.

Then, on August 10, 1996, the Minneapolis Star and Tribune published ***Tribes' political acumen growing***, by Greg Gordon, Star Tribune Washington Bureau Correspondent.

Both newspaper articles show the thousands of dollars which were funnelled directly to the two major political parties to promote the donors' agenda. *The donors were tribal councils and their casino interests.*

Let us pause. A federally-recognized tribal government comes under the purview and authority of laws surrounding political contributions. They may be state laws. They may be only federal laws, **but they cannot escape scrutiny**.

In Minnesota, corporations are specifically prohibited from contributing funds in support of or in opposition to a campaign for political office. Minn. Stat. Ann. § 211B.15, subd. 2 (West 1997). Foreign corporations violating this law face a fine of up to $40,000 and may be excluded from doing business in the State of Minnesota. ***Id.*** subd. 7.

Minnesota municipalities are regulated. The mayor and the city council are forbidden from taking municipal monies and writing checks directly to candidates for political office. There are legitimate means that all entities can employ, PACs, registered lobbyists, etc., but with any type of corporation, the scrutiny becomes intense and civil and criminal liability a possibility.

Federal law restricts corporate campaign contributions even more severely than Minnesota law, barring certain contributions by *any* corporation. 2 U.S.C. § 441b (1994) (prohibiting certain contributions by any corporation in connection with federal elections). Severe restrictions apply to federally incorporated Indian tribes and other federally incorporated entities. 25 U.S.C. § 477 (1994) (barring contributions in connection "with **any** election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office") (emphasis added).

Federally-recognized Indian tribes contributing directly to political candidates are in a "grey area" when 25 U.S.C. § 477, 2 U.S.C. § 441b(a), and other pertinent Minnesota state and federal laws are read together. Section 441b(a) states:

> It is unlawful for any national bank, **or any corporation organized by authority of any law of Congress**, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever * * * .

2 U.S.C. § 441b(a) (emphasis added).

The two newspaper articles cited above are of public record. The matters contained therein revolve around issues of tribal government. I can only note that if

appellant and other tribal governments persist in positioning themselves as "sovereign nations," then the "Indonesian" and the "Asian" problem of potentially illegal political contributions will be added to the scrutiny the above-cited laws call for.

If Indian tribal entities and their representatives undergo the same scrutiny as is expected of all other individuals and entities in this state and in this country on issues of political contribution and all is well, then all is well. *If all is not well, then all is not well.*

There is a complete lack of information on tribal council business as compared to what we normally get relative to city, state, and federal business. It must be noted that Minnesota's guarantees of freedom of the press, open meetings, and disclosure of public records are not enforced on Indian reservations. As a direct result, of the eleven reservations in this state with their approximate 12,000 members, not one single reservation has on its land an independent, privately-owned newspaper with an independent owner/publisher to bring the news about the reservation to readers both on and off the reservation. Many small towns in this state with populations roughly comparable to those of the eleven different reservations contain a locally-owned, truly independent newspaper or are serviced by major metropolitan dailies. On the other hand, no small town local independent newspaper or major metropolitan daily goes into reservation business council headquarters, as is common in all other government buildings in this state, and gets information because they want it, and because by law they can get it.

Minnesota's laws mandating freedom of public information to the press and to its citizens is forcefully protected everywhere in this state except on our Indian reservations. The failed federal policy of "sovereignty" prevents Indians on and off the reservation, and all other people on and off the reservation, from inquiring into tribal government.

Thus, much of what needs to be known, what needs to be exposed so that truth flows over the issue, is hidden from the light. The "darkness" on Indian reservations has been chronicled.

Noted Indian author Jim Northrup, Jr., a decorated Marine Corp. veteran from Vietnam, a state and nationally recognized writer on Indian country, said the following in the December 1996 issue of "The Circle." The Circle is subtitled "News from a Native American Perspective . . . (The Circle is a newspaper housed and published in Minneapolis. It could never survive if housed and published on a reservation.) In his regular column, "***Fond du Lac Follies***," Jim Northrup stated in pertinent part:

> I went to the Reservation Business Committee's open meeting. This quarterly meeting was held in the Black Bear Casino. Remember when we used to have monthly open meetings?
>
> What a disappointment.
>
> Secretary/Treasurer Pete Defoe refused to give out information about how much money the RBC members make. So much for open government. He said no in spite of the fact that he signed an August request to make such information available. I would really like to see the RBC's income tax forms.
>
> Two lawyers spoke to the people about 1837 Treaty litigation and a 20 million dollar offer to settle a claims dispute. The droning lawyers almost put people to sleep. I wondered about those lawyers.
>
> * * * *
>
> My friends from Scotland report the Association of Native American tribes is still doing a good job of educating the Scottish people about us.

> I bet it is hard for them to explain what the RBC is and how they work.
> I am longing for Scotland.

Jim Northrup, Jr., ***Fond du Lac Follies***, The Circle, Dec. 1996, at 9.

Jim Northrup wears the "shield" of freedom of speech and wields the "lance" of the pen.

With no legislative oversight, no state judicial oversight, no freedom of speech and freedom of the press on Minnesota reservations, the reservation business councils with their gaming casino money go unchecked.

Another recent article by Jim Northrup stated in pertinent part:

> On December 3, an application was received by the Fond du Lac Reservation Business Committee. The application for a gambling license is required under FDL Ordinance #09/93, as amended.
>
> The application was submitted by the Board of Directors of Fond du Lac Management, Inc. The letterhead lists the following Board members: Robert B. Peacock-Chairman, Peter J. Defoe-Secretary/Treasurer and members are Daryold Blacketter, George Dupuis and Clifton Rabideaux.
>
> Hey-wait a minute! These are the same guys that sit as members of the Reservation Business Committee. Did they really ask themselves for a license? Want to guess what the vote was?
>
> I wasn't there so I will have to surmise what happened at the meeting. Did the Chairman/Chairman ask for the license or was it one of the other voting members? Were they sitting on one side of the table as applicants and then on the other side of the table as voting members?
>
> I think the Management Company should have regular citizens on the Board in addition to the RBC members.
>
> It has been happening like this since the Ordinance was passed by the RBC in 1993. It ain't pretty but it is what passes for democracy on the Fond du Lac Reservation.

Jim Northrup, Jr., ***Fond du Lac Follies***, The Circle, Jan. 1997, at 9.

It is sufficient to say that if Minneapolis or St. Paul gets a lucrative professional sports franchise under the partial or full ownership of that city, their city councils will not enjoy this kind of power.

Where is the "main stream press" in this state on this issue? I suggest they try to go to reservation business council meetings and demand their right to attend and their right to full and complete copies of all public documents under Minnesota open meeting law. Minn. Stat. § 471.705 (1996). I suggest the main stream press go to every "tribal court" in Minnesota and demand a complete and full list of all constitutions, statutes, internal rules, court rules, copies of past decisions, etc., the same as they can do today to any state or federal court in Minnesota.

There is another piece to the puzzle as to how we have arrived in the State of Minnesota, long known for its openness, in the corrosive and mismanaged atmosphere of tribal governments and their gaming casinos. That piece is the fierce opposition of those who oppose the Indian people crying for social justice and accountability; and the fierce opposition to those who support Indian people in their struggle.

An article from the October 25, 1996, Native American Press, entitled ***Judge Randall Cut from Race Bias Task Force Meeting***, stated:

> At a meeting on Thursday, October 17 some of the primary beneficiaries of tribal sovereignty used their influence to stifle the voice of a true advocate for Indian rights.
>
> * * * Tribal culture and jurisdiction were primary topics of discussion.
>
> The first judicial district's Race Bias Task Force and the American Indian Bar Association of Minnesota sponsored the meeting. Since it was

created in 1994, the first district Race Bias Task Force has been very active in promoting educational programs on cultural diversity. * * *

Judge Spicer, chairman of the first district's Race Bias Task Force and a district court judge in Dakota County, wanted a state judge to speak at the meeting on the Indian Child Welfare Act. When someone suggested Judge R.A. (Jim) Randall, Spicer rightly believed that Judge Randall sounded like the perfect candidate. As described in the August 9, 1996 issue of the Native American Press, Judge Randall, a judge on the Minnesota Court of Appeals, has a long history of standing up for Indian people. He has defended, promoted, and advocated on behalf of Indian people, Indian culture and Indian rights for over 35 years.

* * * *

Based on this information, Judge Spicer naturally thought that Judge Randall would be an informative, interesting, and thought-provoking addition to any discussion about Indian culture, rights, and sovereignty. Judge Spicer didn't realize that his invitation to Judge Randall would be vetoed by the powerful and influential lobby that promotes tribal sovereignty.

* * * The American Indian Bar Association threatened to withdraw their sponsorship of the meeting if Judge Randall spoke. Could it be that these powerful attorneys of Indian law are afraid of what Judge Randall has to say?

* * * *

The Race Bias Task Force and the American Indian Bar Association could not find any other state or district court Judge willing or able to speak knowledgeably about the issues, so no one from a state court spoke at the meeting.

* * * *

Judge Spicer recently resigned his position as chairman of the first district's Race Bias Task Force. When asked why he resigned, Judge Spicer said, "What happened to Judge Randall was wrong. To me it was a freedom of speech issue. I felt morally bankrupt when it was all over and felt the only thing I could do was resign. I am still going to be on the Race Bias Task Force, but not as its chairman."

Julie Shortridge, ***Judge Randall Cut from Race Bias Task Force Meeting***, Native American Press, Oct. 25, 1996, at 1.

What is remarkable about the above is that the Racial Bias Task Force is an official body promoted by the Minnesota legislature with the Minnesota Supreme Court monitoring policy and implementation throughout the courts in this state. The policy and implementation can be explained by a single statement. The Racial Bias Task Force is to promote openness about our multicultural state and expand our knowledge and our acceptance of our diverse population. As the Native American Press article sets out, this is hardly the case when the Racial Bias Task Force's implementation steps on the toes of tribal governments and their casino interests.

That people disagree from time to time with a judge after the release of an opinion (those involved in the opposition to my presence at the Race Bias Task Force meeting will concede what happened was a direct result of their disagreement with my dissent in *Cohen*) is a nonissue. Throughout this state, throughout this country, in state and federal court systems thousands of dissents and concurrences paper our law libraries. Dissents, concurrences, and majority opinions that some disagree with, come in a weekly stream from the Minnesota Intermediate Court of Appeals and the Minnesota Supreme Court. The same is true of all levels of appellate review in the federal system.

The response from those in Indian country concerned about true freedom and true openness on the issue of "sovereignty" was immediate. Within days, the Native American Press received the following letter from a respected Ojibwe author, essayist and writer of regular monthly columns for various Indian newspapers:

To the editor:

> The recent report concerning the banning of Judge Jim Randall from a meeting of the Race Bias Task Force was certainly a disappointment, but not a great surprise.
>
> Randall has proven himself a friend and advocate of the Native American community many times over while those who seek to stifle his voice have done little but promote themselves and protect their income.
>
> Apparently those who felt threatened by Randall, (who may know more about tribal culture, history and law than they do) decided to protect their public image by keeping him out of the debate.
>
> Many despots use this tactic to strangle the spirit of truth. If you don't like an opinion use your position of power and influence to ban it. That's the message that such small-minded conduct sends.
>
> But it also raises questions about the American Indian Bar Association. Why DID the association threaten to withdraw their support of the meeting if Randall was allowed to speak?
>
> At any rate the banning of Randall has succeeded in making us all poorer.
>
> It's our loss when knowledgeable, thoughtful, radical words are deleted from the commons where ideas are formed and offered for discussion and debate by those who fearlessly and shamelessly protect our right to consider them and in the process find our horizons expanded and our lives enriched.
>
> Yours in the struggle:
> Anne M. Dunn
> Cass Lake, MN

Anne M. Dunn, ***Concerned with the Banning of Judge Randall from a RBTF Meeting***, Native American Press, Nov. 1, 1996, at 4.

State and federal trial and appellate judges speak regularly at public forums, symposiums, CLE courses, MILE courses, and at conferences and other meetings open to the public in public buildings. The Dakota County courthouse is a public building in this state wherein not just sitting judges, but more importantly, all citizens may come and listen, and if invited to speak, may speak their mind. Silencing a sitting judge, any

elected official, any citizen, in a public building, calls into serious question the motives of those responsible.

In the previous reference to Albert Einstein's letter, just substitute "casino managers" for "industrialists." Then examine Einstein's further commentary:

> [H]ow is it possible that this group, such a small minority, can make subservient to its desires the masses of the people who by a war stand only to lose and to suffer? The immediate answer is: the minority, the ruling class, is in possession of the schools, the church and the press. By these means it rules and guides the feelings of the majority of the people and bends them to compliance.

Albert Einstein, *Why War?* (emphasis added).

The "ruling class" can be paralleled to those in charge of tribal government and their casinos who wish to preserve the status quo.

The querencia is that part of the bull-fighting arena where the bull chooses to make his stand in what he knows to be a life and death struggle with the matador. The querencia of public debate on social justice for Indian people has to be moved to the open air of a public forum and out of the windowless counting rooms of the reservation casinos. That debate is becoming a life and death struggle.

In 1997, and going back a few years, Minnesota's Indian reservations are starting to drown in a sea of litigation, state and federal, federal indictments, and federal investigations. There is a corrosive cancerous atmosphere within small cliques of people on reservations fighting each other. Tribal governments have to be allowed to organize under Minnesota laws pertaining to municipalities. Without that ability, reservation

residents can never be guaranteed constitutional governments, fairly elected tribal officials, and a fair share of the gaming proceeds. They must be allowed to take title to their own land. The "federal ward relationship" from ***Cherokee Nation*** to today, as we approach the twenty-first century, is a vicious formidable obstacle that may not allow Indian people on reservations to make it to the twenty-first century. ***Cherokee Nation***, 30 U.S. (5 Pet.) at 16 (characterizing the relationship between Indian tribes and the United States Government as one "resembl[ing] that of a ward to his guardian.").

Paul Tillich, the eminent German theologian and philosopher (1886-1965), wrote prolifically throughout his life using themes such as salvation, redemption, the struggle to recognize right from wrong, and the ongoing struggle for justice and truth.

In one of his essays entitled, "The God above God" from his book ***The Courage To Be*** (1952), Tillich discussed how "the courage to be" is sometimes found in the God (truth), who appears when surety about the existence of God (truth) disappears in the anxiety of doubt.

Tillich discussed, if I might paraphrase, that "grey mist of the soul" that appears at 3:00 in the morning when we lie awake in the anxiety of doubt, while the forces of darkness battle with the angel of truth in the "morgue of our conscience."

From examining their biographies and the history of their times, it is certain that President Lincoln on the question of slavery, and Justice John Harlan on the question of separate but equal, black apartheid, "knew 3:00 in the morning." History graciously has

vindicated Lincoln and Harlan 100 percent, 500 percent, 1000 percent. At the same time, spoke, contemporary history was not so kind.

In another essay, Tillich described those brief moments of clarity in our lives when for a second the "clouds part," and we are given a "fragmented moment of unambiguity." Tillich noted that they passed quickly, and were perhaps the only guidance that ultimately can be expected of divine providence. The agnostic cannot dial up heaven and get confirmation that it exists; the atheist cannot dial up heaven and get confirmation that it does not.

As the federal judiciary and Congress and elected state officials struggle to find their moments of clarity on the issue of social justice for Indian people, I suggest the moment of simple truth is:

A. Pre-1924, American Indian people had not been granted citizenship in the United States of America. The Indian Citizenship Act was passed in 1924. Act of June 2, 1924, 43 Stat. 253, now codified as 8 U.S.C. § 1401(b) (1994).

B. From 1924 on, all American Indian people are full citizens of this country and their rights as such cannot be abridged.

C. *Brown v. Board of Education* in 1954 included all citizens.

After 1863 (Emancipation Proclamation and Thirteenth, Fourteenth and Fifteenth Amendments) we no longer need to *Dred Scott* and its progeny as controlling on the issue of slavery. After 1954 we no longer need to the *Plessy* majority and its progeny as controlling on the issue of separate but equal. Controlling federal case law on Indian people predates 1924, much of it going back to the early and middle nineteenth century.

See, e.g., Cherokee Nation, 30 U.S. (5 Pet.) 1. The preservation of the present federal government ward status for Indian people hinges on a direct chain to *Cherokee*, and after 1924 the chain is broken. When you become an American citizen through birth, your legal life starts. When you become an American citizen through naturalization, your legal life starts over. In 1924 all American Indian people were finally granted full citizenship. You remain the same person, retain the same ethnicity, the same race, the same color, the same culture, and the same religion. But the legal dynamics of your life, your rights, your privilege, and your obligations start over, and are now confirmed by your status as an American citizen and as a resident of the state of your domicile.

There are dozens of pre-1924 cases, state and federal, discussing in various ways the themes we struggle with today, sovereignty, semi-sovereignty, qualified immunity, sovereign immunity, nation-within-a-nation, tribal government, tribal courts, self-determination, and self-governance. State and federal cases since 1924 discussing these issues use those pre-1924 cases in the chain of reasoning.

Yes, there is much to be learned from pre-1924 cases, but it is in an historical sense rather than in a relevance sense. *Dred Scott* and *Plessy* have historical relevance but no longer have legal relevance.

We have in the past, and do now, preserve writings, documents, photos, and artifacts that date historical landmarks in our country's history, landmarks that mark changes in the course of this country's growth through social justice. We retain documentation and artifacts of slavery, such as old photos, newspaper articles, old

manacles and chains. But life has to go on! ***Brown v. Board of Education*** held unequivocally that segregation or apartheid based solely on the basis of race was a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the federal Constitution. ***Brown***, 347 U.S. at 495, 745 S. Ct. at 692. ***Brown*** was used as a touchstone, a lodestar, for the eradication of all other laws denying equal protection based solely on race. Rights too numerous to mention included, without limitation, voting rights, employment rights, housing rights, public accommodation rights, association and group activity rights, and a host of others.

Brown v. Board of Education did not exclude any race or color or ethnic group from its holding. It did not with specificity name Indian children, Hispanic children, Latin children, Chicano children, Korean children, Chinese Children, etc. But it included the all-encompassing "colored children." **No one was excluded.** ***Id.*** at 494, 74 S. Ct. at 691 ("'Segregation of white and colored children in public schools has a detrimental effect upon the colored children.'") (quoting the findings of fact of the lower court).

Although Brown spoke specifically to the segregation of children in public schools under the guise of separate but equal, both its proponents and its opponents knew it was not limited to "children of school age," Both sides knew it included all persons regardless of age within its holding.

Today, the Minnesota Indian tribal reservation system is isolationism and red apartheid. It is the black apartheid practiced in this country before ***Brown v. Board of Education***. It is simply wrapped in another color.

Indian people residing in Minnesota but not on a reservation are guaranteed the benefits of the Minnesota Constitution and the United States Constitution and its Bill of Rights

Indian people living on Minnesota reservations are not.

Indian people not living on reservations are guaranteed a voting process for their city, county, and state elections regulated by the Minnesota legislature, the Secretary of state.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are guaranteed the right and ability to buy and sell the home they live in.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are guaranteed that when tried for criminal offenses in a constitutional court and acquitted, they are freed.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are guaranteed the benefit of all federal and state civil rights laws.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are entitled to the benefit of OSHA laws; Americans with Disabilities Act laws.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are guaranteed the right to civil service classification laws; teacher tenure laws; National Labor Relationship Act laws pertaining to the right to unionize.

Indian people living on Minnesota reservations are not.

Indian people in Minnesota not living on reservations are guaranteed freedom from discrimination based on gender, age, religion, race; and all other state and federal laws that protect the broad state and federal constitutional guarantees of citizens in this country.

Indian people living on Minnesota reservations are not.

Indian people living in Minnesota not on a reservation have a constitutional guarantee of direct access to state and federal courts in Minnesota.

> Indian people living on Minnesota reservations do not.
>
> Indian people living in Minnesota not on a reservation are treated the same as all other Americans. ***Brown v. Board of Education*** protects them. Indian people living on Minnesota reservations do not have that protection.

See Tom v. Sutton, 533 F.2d 1101, 1102-03 (holding federal constitution inapplicable to Indians on reservations).

If the pernicious dichotomy I have outlined leads to the observation that Indian people (American citizens) living on Minnesota's reservations are not treated "separate but equal" (which would be unconstitutional), but are rather treated "separate but less equal," then the compelling mandate of ***Brown v. Board of Education*** *becomes even more compelling* that immediate unflinching attention be paid to this issue of social justice and the necessary corrective measures taken.

Sutton remarkably states that the ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792 (1963), constitutional guarantee to appointed counsel does not apply to "Indian courts" in criminal trials and is not a constitutional right guaranteed to Indians living on the reservation. The ***Sutton*** court went on to state in part:

> This holding is consistent with other judicial decisions finding the Constitution inapplicable to Indian tribes. Indian courts and Indians on the reservation.

533 F.2d at 1102-03.

Sutton is a lesson in the history of the denial to those domiciled on an Indian reservation of the most basic rights we enjoy as American citizens.

A respected United States Senator, a recognized expert on constitutional law, former North Carolina Senator Sam Ervin, introduced a bill in 1965 to ensure that American citizens living on Indian reservations were protected from their tribal leaders, just like the United States Constitution protects all citizens from the arbitrary power of the United States government. It can be assumed that Senator Ervin, with his tremendous legal background, understood the serious implications of parallel governments in this country for Americans where in one track the U.S. Constitution (and thus the state constitutions) were in place, and another parallel track where they were not. *Tribal leaders aided by the Department of the Interior and the Bureau of Indian Affairs appeared in opposition to Senator Ervin's proposition that Indian tribes adopt the United States Constitution "in toto" and they were successful in defeating Senator Ervin.*

> The clear import of the statute is that a criminal defendant may be represented by counsel but only at his own expense.
>
> This interpretation is further supported by the legislative history of the Indian Civil Rights Act. In 1965, Senator Ervin introduced a bill which would have restricted the Indian tribes, in exercising their powers of local self-government, to the same extent as imposed on the United States government by the United States Constitution. However, when hearings on this bill before the subcommittee of the Senate Judiciary Committee were **convened, representatives of various Indian tribes appeared in opposition to the adoption of the federal constitution** ***in toto***. As a result of the objections to Senator Ervin's bill, the Department of the Interior submitted a substitute bill which **guaranteed only specific enumerated rights to the Indians**.

Sutton, 533 F.2d at 1104 (emphasis added).

The final bill had several notable exceptions to the requirement that federal and state governments observe the Constitution of the United States.

The subcommittee endorsed the substitute bill and, in its summary of the report, stated:

> 'The Department of Interior's bill would, in effect impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., the 15th amendment, certain of the procedural requirements of the 5th, 6th, and 7th amendments, and in some respects, the equal protection requirement of the 14th amendment.' The summary of the report was subsequently adopted and endorsed by the Senate Judiciary Committee.

Id. at 1104.

The American Indian Citizenship Act, Section 1401(b) states:

§ 1401. Nationals and citizens of United States at birth.

The following shall be nationals and citizens of the United States at birth:

* * * *

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such persons to tribal or other property;

8 U.S.C. § 1401(b).

Some may argue that the surviving of "tribal and property rights" enables this unconstitutional due process to continue. In terms of property rights, section 1401(b) is nothing but a reiteration of longstanding law that applies to all landowners.. At one time in America, there were no organized states. Then there were 13, and then one by one we moved to 50. People owning land in a territory which later became a state retained their rights of ownership in that land. Today, when unincorporated townships become cities or towns, or are merged into cities or towns, the property landowners come under

new laws and regulations and the legal dynamics of governance changed, but their land title does not. This country has always recognized this principle. If Indian tribes owned land prior to 1924 or have residual gathering rights from treaties signed before 1871, American citizenship would not diminish those property rights. But "tribal tradition," if it results in the denigration of human rights and civil rights, had to change when full American citizenship was granted in 1924. If not, you have, as I point out, classic red apartheid, apartheid between Indian people living on reservations who are denied constitutional guarantees and Indian people living off the reservation who enjoy all state and federal constitutional guarantees.

Clear example: in 1924 no state, no law enforcement personnel, no state or federal judges granted their citizens the constitutional rights of ***In re Gault***, 387 U.S. 1, 87 S. Ct. 1428 (1967); ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602 (1966); *Gideon*, 372 U.S. 335, 83 S. Ct. 792 (1963); ***Wong Sun v. United States*** 371 U.S. 471, 83 S. Ct. 407 (1963); ***Mapp v. Ohio***, 367 U.S. 643, 81 S. Ct. 1684 (1961), etc. But when those cases went into effect, no state or federal court that had previously not granted them (because they had not been articulated) was exempt from protecting those guarantees in the future. No state had "grandfather rights" in what had formerly been considered due process, but is now considered a constitutional abuse of due process.

Yet today, "***Sutton*** reasoning" purports to allow Indian tribes and Indian tribal courts to "cherry-pick" the constitutional guarantees and the due process that they want to extend to the residents of the reservation. At the same time, those very same

residents, the minute they are one foot off the reservation, have a right to demand, and we will give them, every single enumerated constitutional right existing in 1924 right on through all expanded constitutional rights to this month in 1997.

The fair, the hard but true conclusion is that this duality of on-reservation life and off-reservation life is red apartheid. I respectfully argue that ***Brown v. Board of Education*** and its progeny excluded no one from the power of its protection.

The ill treatment, and the denial of the most basic rights continue on reservations if the tribal council so votes. This is not to state that there are civil rights and denials of due process of constitutional dimension on all of the over 500 federally-recognized tribes in this country. This is not to state that there is systemic and institutionalized mismanagement on all of the over 200 Indian gaming franchises in this country. But this concurrence is to state that there are documented abuses and documented mismanagement, and there can never be constitutional *guarantees* of due process on *any* of the 554 federally-recognized tribes until we recognize, and then admit, that red apartheid exists, and take the necessary corrective measures to bring every citizen in this country under the federal constitution and their state constitution "*in toto*."

An article about the Laguna Pueblo in the December 20, 1996 issue of the Native American Press stated in pertinent part:

> JUDGE REFUSES TO ALLOW WOMAN ON TRIBAL BALLOT.
> A Laguna Pueblo judge has ruled that a woman cannot run for the office of tribal treasurer in Monday's election, but voters will decide whether women should be allowed to break into Laguna politics. Tribal Judge Melvin Stoof on Thursday upheld a Laguna Tribal Council decision that Emily

> Cheromiah, 44, could not seek the post of treasurer on the grounds that tribal traditions prohibit women from running for office. While voters won't be voting on Ms. Cheromiah specifically, they will be asked to decide whether women in general should be allowed to run in future elections for tribal offices of treasurer, secretary, interpreter and as council delegates from the six Laguna villages.

Judge Refuses to Allow Woman on Tribal Ballot, Native American Press, Dec. 10, 1996, at 2.

It can be noted that on the Laguna Pueblo, a 1992 ballot question asked "voters for their input on the role of women in tribal politics." The proposition allowing women on the tribal ballot was passed by a vote of 730 to 425. But following the vote, tribal councilors said "the 1992 vote was not binding."

Since 1924, all women and minorities, including all Indian people living in any part of their state except on a reservation, have enjoyed tremendous advancements in the area of social justice and the right to the full protection of their state constitution and the U. S. Constitution. Why have we left those Indian men and women who choose to reside on their home reservation locked in the Eighteenth and Nineteenth Century? The legal dynamics of 1924 when American citizenship was conferred on America's Indian people *has to stand for something*.

I can only note that until state and constitutional guarantees are firmly in place, any Indian tribal government, on a given day, can decide to extend some rights to reservation members and then the next month or the next year change their mind and take it away or limit it.

The civil rights abuses and the denials of due process reflected in this opinion affect men and women alike, affect Indians and non-Indians alike. The criminal defendant in ***Sutton***, and the criminal defendant in ***Red Lake v. R. Smith*** were Indian men. The Laguna Pueblo "tradition" involved Indian women. The plaintiffs in *Gavle* and ***Cohen*** were non-Indian women. The respondent in this case is a non-Indian business entity. Put another way, anyone who enters onto an Indian reservation or touches it in a commercial way is subject to a possible lack of state and federal constitutional guarantees. This condition, this "black hole" in the federal constitution, exists nowhere else in the United States of America. For those members of well-managed reservation business councils, for those reservation business councils that operate well-managed Indian gaming casinos, they need to come forward and help take an open and honest lead for the needed reforms so that all do not eventually get dragged down.

Recently, tribal members from across the country assembled in Washington, D. C. "to protest threats to their sovereignty." The protest was not about Native culture. The protest was against legislation passed by the State of Rhode Island that affected Indian gaming in Rhode Island. The state legislation was "aimed at leveling the playing field on all parties seeking to open a casino."

One Minnesota tribal leader was quoted as stating, "We're going to put the 105th Congress on notice that Indian tribes will not tolerate attacks on their sovereignty." Brian Bakst, ***American Indians demonstrate at Capitol to protest 'attacks on sovereignty'***, Native American Press, Jan. 24, 1997, at 1, 3.

I can only note the obvious. Between ***Cherokee Nation, Oklahoma Tax Commission v. Texas. Rice v. Rehner, Gavle. United States v. Wheeler, Lone Wolf, and Race Horse***, and all of their respective progeny, it is beyond dispute that the Congress of the United States of America has Indian tribes under its plenary power and has total control over tribes to the point where their immunity can be limited or completely eliminated. Thus, the January 1997 demonstration at our Nation's Capital, put another way, was as ineffective, futile, and arrogant, as any group of American citizens traveling to Congress "to demand" that Congress stop passing laws affecting taxation, clean air, clean water, civil rights acts, the budgets of federal agencies, and the budget for the Pentagon!

The protesters' argument cannot be taken seriously if constitutional guarantees for Indian people living on reservations, and all those who come in contact with reservations, are finally going to be put in place.

The "protest" was not about culture or anyone's way of life. It was a protest against an attempt by the State of Rhode Island to regulate gaming casinos within its borders. Rhode Island, like all states that sanction any type of gambling, has in place state regulations emphasizing accountability.

The issue today that is covered in this opinion is not, and has never been, about freedom of culture and freedom of religion. The United States of America and its 50 states are among the finest places in the world to enjoy constitutional guarantees of freedom of culture and freedom of religion. Christians of all sects, practitioners of

Judaism of all sects, Muslims, Buddhists, etc., anyone who uses churches, temples, synagogues, mosques, etc. have rigid protection laws in place, and a history of rigid enforcement. Smaller groups that might be considered out of the main stream enjoy the identical protection in this country. Some examples might include, without limitation, Amish, Mennonites, Hutterites, Hasidic Jews, strict fundamentalist sects, Evangelical or Charismatic sects, etc.

Religion and culture are used, cruelly, by tribal business interests to act as "the point" or shield for the tribal business interest's all-consuming desire to remain free of the normal rules of accountability that surround the federal government and its agencies, that surround state government and its agencies, and that surround municipalities within a state's border.

A year ago, Washington, D.C. played host to a conference called "The National Summit on Ethics and Meaning." A contributing editor to Harper's Magazine who attended the conference had the following observation about the different uses the trendy buzz word "religion" is today attached to:

> I whispered to myself Charles's phrase *last days, last days* and pursed my lips and gritted my teeth and tried to keep my mind sharp and my heart open as I heard with astonishment--among educated and privileged people--some of the worst nonsense I have come across in more than forty years of listening to people in public places butcher truth and sell themselves to others.

Peter Marin, Essay, ***An American Yearning***, Harper's Magazine, at 37 (Dec. 1996).

That observation comes to mind as I examine the issues in this case and others, issues of "sovereignty" wherein, in truth, the issues are only about dollars.

> Why is social justice in this country today always about the ___ money?! Indian "sovereignty" today is used principally for three reasons: (1) for the tribal government and its casino interests to shield tribal enrollees on and off the reservation from how much money is being taken in; (2) as a shield for alleged law breakers to attempt to avoid prosecution under applicable state and federal criminal laws (***see Jackson***, ___ N.W.2d ___, No. C8-96-1668, 1997 WL 18304 (Minn. App. Jan. 21, 1997); ***Stone***, ___ N.W.2d ___, No. C9-96-1291, 1996 WL 721562 (Minn. App. Dec. 17, 1996); ***Bray***, 555 N.W.2d 757; and the above-referenced sovereign defense of the tribal officials in federal district court in 1996); and (3) as a shield to keep from having to answer as defendants in bona fide civil lawsuits (***see Gavle***, 555 N.W.2d 284, and this case).
>
> The black african slave trade was also about the money! White slavery was about the money! The importation of Chinese people (we called them "coolies" then) in the nineteenth century to complete our railroads from the east to the west was about the money! Mexican Braceros stoop-picking lettuce and sugar beets, and denied the benefits of unionization was about the money!

There is a ray of hope. ***Sutton*** has never been reviewed by the U. S. Supreme Court. It has never been cited as a constitutional exception to ***Brown v. Board of Education***. What ***Sutton*** purports to say is that individual Indian tribes have the right to pick and choose what constitutional guarantees, what amendments to the Bill of Rights they and their "tribal courts" will grant to American Indians domiciled on the reservation. *This must give us serious pause.*

If the voices of Indian and non-Indian people who know that wholesale institutionalized change must come, and come quickly, before the cancer of red apartheid becomes incurable, are not heard (meaning the present isolationism and apartheid of

reservation life is continued) we might as well do Minnesota reservations the courtesy of appropriating money from Minnesota taxpayers and the federal treasury to ensure that their water fountains are equal to ours, that their lunch counters are equal to ours, that the tribal courts have as many computers and books as we do, and that their schools are equal to ours!

We put up with slavery from 1619 to 1863. We put up with black apartheid from 1863 to 1954. It is now 73 years since the American Indian Citizenship Act of 1924. The state courts, federal courts, state legislatures, the federal Congress, state executives and federal executives have had enough history to "make things right."

Using ***Brown v. Board of Education***, laws passed by Congress, and executive proclamations (see Emancipation Proclamation) as a vehicle, we immediately need to put into motion case law and statutes conferring on all American Indians full statehood and full right to the United States Constitution and its Bill of Rights regardless of where they live in America. If there is confusion or uncertainty on how best to accomplish this overriding need, ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137 (1803), wisely denominated the tie breaker.

We need to establish Indian reservation boundaries and begin "the municipal process" of bringing them under county, township, and city forms of government. The mechanics can be worked out. Minnesota's Municipal Commission, Minn. Stat. §§ 414.01-.09 (1996), and similar state agencies in other states, have been in business for

years. We have the ability. We platted and land-titled this entire country from Plymouth Rock west to the Pacific Ocean.

We need to move as quickly as possible to abolish all tribal courts and as expeditiously and efficiently as possible move all pending matters into the nearest state or federal district court with venue and jurisdiction.

The issue before us, tribal courts and their "comity" and "jurisdiction," is simple. After consultation between federal, state, and tribal leaders as to how to allow an orderly transfer of all pending matters to the nearest state court, meaning the nearest independent court, tribal courts *should be abolished overnight*. Nothing would be lost for people on reservations because as state citizens they should have the right now to direct access to Minnesota district courts to plead their cases and to plead their defenses. *See* Minn. Const. art. I, § 4 (stating "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy"). Other state constitutions similarly protect their state residents. *See, e.g., Lambert v. Ryozik*, 886 P.2d 378 (Mont. 1994). In *Lambert*, an enrolled member of an Indian tribe brought a personal injury action in Montana state district court against a non-resident motorist for injuries arising out of a car accident that occurred within the boundaries of appellant's tribal reservation. The defendant motorist moved to dismiss the action "for lack of subject matter jurisdiction." The district court dismissed the lawsuit, believing it was guided by precedent that stated the jurisdiction of the tribal court pre-empted the jurisdiction of the state district court.

The Montana Supreme Court made short shrift of the argument and stated flatly that plaintiffs (Montana Indians), as full Montana citizens, had an absolute right under the Montana Constitution to sue non-Indians in Montana state court. The court said that the failure to recognize this right to sue would deprive an Indian plaintiff of due process and equal protection of the law under the Montana Constitution. *Id.* at 380.

To accommodate litigants, Hennepin County and Ramsey County court trial judges, for instance, have for years maintained moving locations within the Twin Cities suburbs to service their constituents. Arrangements can be made to hold state district court hearings on Indian reservations. We are only talking about bringing an additional 12,000 people into our state constitutional provisions who are now denied them. They, like the rest of us, are entitled to direct access to our constitutional state courts. If the tribal courts do not dissolve immediately, why cannot Indians living on a reservation have the unambiguous undeniable right to opt out of that court system and transfer their cause of action, whether civil or criminal, to the nearest state district court with venue? ***Brown v. Board of Education*** would seem to mandate that you cannot impose inferior tribunals on one set of citizens.

Other problem areas will arise, needs will come to the surface, but it can be done. This country survived slavery, black apartheid, World War I, the Great Depression, and World War II. When it is essential to make things right, America has always passed the test.

The solutions of constitutional dimensions are straight forward. Give Indians living on reservations full statehood; give them state-regulated municipal forms of government: allow them to own their land in fee simple: do immediate audits of all Indian gaming casinos through a cooperative effort of state and federal agencies. We do that now with all banks in this country. Bank examiners make regular audits at irregular times to ensure that the money that is supposed to be there, is there. Periodic bank examination works to the benefit of the bank. It ensures confidence in them by the public. The periodic examinations work to the benefit of the public, it maintains that confidence. The General Accounting Office (GAO), an official branch of the federal government, has the right to monitor federal enclaves, federal agencies, and anything else Congress directs it to, over which Congress has plenary power.

Whenever states or the federal government grant lucrative commercial franchises, which at times can amount to a partial or full monopoly of certain kinds of commerce, carefully crafted state and federal regulations work together to ensure that the public trust will not be abused and that public money will be accounted for.

The Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC) are but a few examples of the numerous federal agencies, which, with their parallel state counterparts, protect the public interest in such areas as securities, registration and their buying and selling, the awarding of airwave rights for radio and television stations, and the selling of insurance and real estate.

The awarding by states of the right to operate a gaming casino, lotteries, pull tabs, horse racing, parimutuel betting, etc. are all tightly controlled by state and federal regulations for the same sound reasons.

Several years ago, the federal government took the fairly unusual, but perfectly legal, step of taking over control of the Central States' Pension Funds of the Teamsters' Union. It was highly charged politically, but it had to be done to protect the assets and the pensions of the members. Duly appointed officials assisted and supervised the Funds' Trustees to ensure an open and orderly accounting of funds received and funds disbursed.

We have never had the decency and the concern for Indian people to ensure that when we granted monopolistic gaming franchises to Indian tribes, those franchises were accompanied by the necessary state and federal regulations needed to guarantee that funds received and funds distributed were accounted for and the intended beneficiaries fully protected.

The ownership of Indian gaming casinos by the tribes is not the issue. State and federal regulation and open and full accounting is. All Americans, whether Caucasian or of color, anywhere off a reservation engaged in any of the above-named commercial enterprises are equally subject to the appropriate state and federal regulations and authorities regardless of race, culture, or creed.

A federal district court in Minnesota in 1996 went through two lengthy trials, previously described in this opinion, trials which involved multiple defendants and multiple counts, trials where the investigations started back six to eight years ago. To

prevent similar trials from happening again, would it not be appropriate to check with the federal prosecutor's office, his staff and his investigators, to see whether they had any suggestions for the type and frequency of complete audits (as all state and federally chartered banks, regardless of minority ownership or not, are subject to) and other concrete and sensible suggestions to ensure that casino revenues are properly accounted for to all tribal enrollees and the public? Just go ask them.

Direct federal and state law prosecutors to consider full or partial amnesty in as many cases as possible. Thorough audits will uncover mismanaged funds. That is a given. But it is more important that the money be returned to its rightful owners, Indian people, and that the casinos get off to a good start than it is that we spend precious time pointing fingers and going through criminal trials, except possibly those that cannot be avoided.

The state federal issue of "gathering rights" in ceded territory remains open in the Minnesota-Wisconsin area and in other scattered areas in this country. Not all of our 50 states have federally-recognized tribal reservations within their borders and not all those reservations have ceded territory/gathering rights issues. But Minnesota and neighboring states do and the issue is important, volatile, and bitterly divisive. Thus, it needs to be addressed, as ceded territory/gathering rights revolve around "sovereignty." Gathering rights in ceded territory have, and are entitled to have, a life of their own even after the present day version of "sovereignty" is mercifully exposed, eradicated, and replaced with full statehood and full citizenship rights.

The reason gathering rights have a life of their own is that they predate 1871, the year that the U.S. Congress emphatically announced that no more treaties would be signed with Indian tribes because Indian tribes were not independent foreign sovereign nations. But Congress rightfully acknowledged the validity of treaties signed before that year. Thus, present ceded territory/gathering rights cases in federal court must play out until the existence of residual gathering rights from the nineteenth century, if any, is known.

Federal trials to date have found that some residual gathering rights exist; and have found in other cases that gathering rights were fully bargained away (through treaty or other agreement or congressional act). For the residual treaty gathering rights that are found to exist (after the appellate process grinds to a close), fair compensation is due those individuals and tribes whose gathering rights have been found to exist. Any gathering rights found to exist will impact a substantial portion of Minnesota and Wisconsin outside of present reservation boundaries. Business people and homeowners alike in the affected ceded territories are legitimately worried about the possible eventual outcome on their land titles and on their property values and the issue of who will have what ingress and egress to their land which they formerly thought to be theirs unconditionally. Indian people with gathering rights have legitimate concerns about getting what is rightfully theirs. At this point, state and federal government, with the undisputed power of eminent domain, needs to step in quickly and begin the process of condemnation of whatever residual gathering rights in ceded territories are found to still

exist. The power of eminent domain belongs to state and federal governments. There is a simple two-prong test. It must be for public use and just compensation must be paid. Just compensation can be determined by pretrial agreement or either side can demand a right to a jury trial and the appellate process on what is fair compensation. The power of eminent domain is most used with the condemning of land, but it is also used for other types of property.

> Personal property is subject to the exercise of the power of eminent domain. Intangible property [is] within the scope of this sovereign authority as fully as land or other tangible property.

Waste Recovery Coop. v. County of Hennepin, 504 N.W.2d 220, 227, (Minn. App. 1993) (quoting 1 Julius L. Sachman & Patrick J. Rohan, ***Nichols' The Law of Eminent Domain*** § 2.1[2] (3d ed. 1993)).

The same is true with the federal power of eminent domain.

> And it is clearly established that the power of eminent domain extends both to intangibles, ***see Cincinnati v. Louisville & Nashville R. R. Co.***, 223 U.S. 390, 400, 32 S. Ct. 267, 56 L.Ed. 481 (1912), and to the product of intellectual activity, ***see Interdent Corp. v. United States***, 488 F.2d 1011, 203 Ct.Cl. 296 (1973) (per curiam).

*Nixon v. **Administrator of Gen'l Svcs.***, 408 F. Supp. 321, 357 n.49 (D.D.C. 1976).

The residual gathering rights in ceded territory need to be fairly assessed and then taken through the power of eminent domain. There is nothing illegal or racial in this process. During the 1960s when the federal interstate system spread throughout this country, at times like quack grass, individual homes, businesses, and at times whole neighborhoods like the minority Rondo neighborhood in St. Paul, Minnesota, were

swallowed up. Mechanical issues of should the highway go here or should it be moved over there are always with us. But no one owning a home or a business could ever dispute that the power of eminent domain has survived all constitutional attacks once the first prong of public use is met; only the issue of what is fair compensation remains.

In Minnesota, approximately 60,000 American Indians, and perhaps some in other states who have enrollee rights in Minnesota, are affected. I suggest the amount of money that will finally be assessed as fair compensation will be large. It will take a little bit of work, and perhaps some difficult work, to distribute those funds to the proper people, both on and off-reservation enrollees, in proper shares. The proportion or percentage of those shares is purely mechanical, that can be worked out later. With only 60,000 Indian people in Minnesota and only several thousand more around the country (I suggest that less than half of Indian people in this country will even be affected, as most do not have this issue), the distribution in a fair manner can be accomplished. Each year the Internal Revenue Service, to name one federal agency, collects from American people and businesses approximately 1.3 trillion dollars. Every year Congress, another branch of government, redistributes it.

I am fully aware that the gathering of fish, animals, berries, medicinal plants, and herbs is a traditional part of American Indian culture. I am also fully aware that the spearing of walleyes during the spring spawning season is legitimately cultural. Spring is the "gathering season" for those fish. But the giving up of the right to gather in ceded territory land is no price to pay at all for the cessation of the bitterness and the corrosive

atmosphere that this issue has visited on this entire state and neighboring states for most of the last decade and with no end in sight. With the compensation to be divided among a relatively small group of people, it will be a legitimate financial windfall.

Both on and off-reservation enrollees who are affected will retain the following: They will retain all the same hunting, fishing, wild rice harvesting, and berry picking rights, etc. that all state citizens enjoy now. In addition, they will have the financial ability with which to pursue such things as the ownership of game farms, buffalo herds, (the Lakota Sioux and other tribes in South and North Dakota have been doing this for the last few years), deer farms, the purchase of private lands for hunting and fishing, as many people, Indian and non-Indian, do now, and other avenues, to make up for just the partial loss of present hunting and fishing rights. I use the term partial because it will only be the loss of hunting and fishing (gathering rights) privileges in certain parts of certain states where, quite truthfully, only a relatively small number of Indian people today even exercise those rights. In return, they are guaranteed by law fair compensation. That is all any citizen is guaranteed. The power of eminent domain can be used ethically and legally for a public use and to promote the public good.

Most certainly there will be these and other important legal issues of social justice for Indian people that will need addressing in the future. If I have to write further, I retain a pen. But the next time I would rather put the pen down and ask those who have questions to retrace with me the parts of the last five decades that I have spent in Indian country and with Indian people. I will show you beauty.

I will show you the beauty of school teachers, without tenure and job security, struggling to teach their young students the value of self-esteem and education on reservations where the schoolhouse roof leaks and the casino roof does not.

I will show you the beauty of the Indian way of life, of sharing, of concern for the young and the elderly, of respect for culture and tradition when culture and tradition are not embroiled in the power struggle for control of tribal government and the reservation casino.

I will show you the beauty of a young Indian woman, a composer, singer, and songwriter, a young woman engaged in the struggle for freedom, singing softly but fiercely of "the storm that's vowed to rage."

The hard issue of "Sovereign Nation" versus the realities of Indian tribes as semi-sovereign governmental entities under the plenary powers of Congress has to be addressed immediately and decisively. Then, the proper reforms to bring all the Americans living on Indian reservations under the protection of their respective state constitution and the United States Constitution must be addressed with the same unflinching resolve that the U. S. Supreme Court, without the benefit of precedent, and flying in the face of precedent, firmly established in ***Brown***. ***Brown*** was the watershed in our multi-cultural country's agonizing search, at times bloody, for social justice without apartheid.

A weak defense of the ***Dred Scott*** court would be that laws against slavery were not put into the final draft of the Constitution, and that, "after all, slavery represents the

norms and values of part of this country." Recently retired Federal Circuit Court Judge Leon Higginbotham, Jr. concluded:

> [D]espite the legalese in the Dred Scott opinion, it was "nothing more than a Southern manifesto on the institution of slavery."

Yale Kamisar, ***Jim Crow on the Bench***, New York Times Book Review, Nov. 24, 1996, at 10.

But if it cannot be said that the ***Dred Scott*** court went "belly up," it can be argued that the ***Plessy*** majority went belly up. Judge Higginbotham came to the conclusion that Plessy may have been a more catastrophic racial decision than ***Dred Scott***. He felt so because ***Plessy*** was decided twenty-five years after the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted.

Judge Higginbotham points out that

> in the course of upholding segregation laws, the Plessy Court relied on a number of cases that were decided before the adoption of the Civil War amendments. He calls the case "the final and most devastating judicial step in the legitimization of racism under state law."

Id. at 10.

The length of this opinion, with majority and concurrence is far less than the length of *Dred Scott*. I know that the majority, concurrences, and dissents in ***Dred Scott*** were studied carefully, as the issue was important. The issue here *is also important*.

In 1954 with ***Brown***, "America's ship on course for social justice" righted itself in words so clear that, despite strong opposition from the Southern block in Congress, President Eisenhower, himself personally not sure that Brown should have been written,

set his jaw and declared that if this is the law, *federal troops, if necessary, will enforce the law*.

American Indian people had been granted citizenship for 30 years before the passage of ***Brown***. Yet today, they have to leave their homes on the reservation to get the benefits of ***Brown*** and its progeny. The day they set foot back on their reservation, they are cast backwards into the time warp of apartheid.

That time warp has been accompanied by the lucrative monopoly in several states of Las Vegas style gaming casinos. That American Indian people have something coming for the total colonization of their country by Indo-Europeans is not in dispute. But 554 tiny federal enclaves where state and federal constitutional guarantees are not in place, and the proceeds from the gaming casinos are not subject to state laws requiring municipalities to account for every penny of their municipality's dollars has come to mean a cruel hoax. Until there is the same accountability that all municipally-owned business entities are subject to. Indian gaming will continue to be a cancerous sore on those Indian people who have not yet left their reservation.

The denial of state and federal constitutional guarantees effects all Indians and non-Indians that live on or visit or touch a reservation. The defendant Ronald Smith from Red Lake, Minnesota and the defendant Rolf Tom from the Lummi Reservation in the State of Washington were Native Americans denied clear cut state and federal constitutional guarantees. Sylvia Cohen and Jill Gavle were non-Indian women who were denied the constitutional guarantees of state or federal district court jury trials for injuries

alleged to have happened on a reservation. Put another way, the cloud of denial of due process on reservations operating under "sovereignty" touches everyone.

It is significant that the knowledge that "all people need to be treated alike," memorialized in ***Brown v. Board of Education***, *was foreshadowed in 1877* by a great American Indian chief and leader. With our present scant but growing knowledge of American Indian history and culture, there are a few names which may be recognized by many readers, some school children. Chief Sitting Bull, Crazy Horse, Seneca, Chief Seattle, Geronimo, and Red Cloud are but a few. I apologize for not mentioning all others who deserve mentioning.

The one I am referring to is Chief Joseph (Young Joseph) of the Nez Perce Tribe (1840-1904). Students of American Indian history are familiar with Chief Joseph's epic struggle with the United States Cavalry in 1877 to bring his people over 1,000 miles from Oregon through Montana toward Canada where he knew freedom lay. It is ironic that he knew freedom lay in a country that was not his, Canada, and did not lay in the country that was his, America. For over 1,000 miles of rough terrain and inclement weather, his small band of warriors fought off, in one of the most famous rear guard actions in American military history, the might of the U. S. Cavalry. The military tactics and the bravery of Chief Joseph and his warriors have been compared to the First Marine Division in late winter of 1950, coming out of the Chosin Reservoir in Korea while holding off several enemy divisions. The Nez Perce warriors struggled to protect the elderly, their young, and their women with the hope of reaching Canada safely. On

September 30, 1877, with most of his warriors dead or wounded and his people starving and just in view of the Canadian border and freedom, Chief Joseph surrendered to federal troops saying:

> It is cold and we have no blankets. The little children are freezing to death. My people, some of them, have run away to the hills, and have no blankets, no food, and no one knows where they are--perhaps freezing to death. I want to have time to look for my children and see how many of them I can find. Maybe I shall find them among the dead. Hear me, my chiefs, I am tired. My heart is sick and sad. From where the sun now stands, I will fight no more forever.

Jim Robbins, ***Into the Storm***, Conde Nast Traveler, Sept. 1996, at 166 (quoting Chief Joseph from Oct. 5, 1877).

The article detailing the above went on to state:

> The fighting had ended, but the dying was not yet over. Despite a promise by General Nelson Miles that they could return to their homeland if they surrendered, the Nez Perce were forced into exile in Oklahoma, where more people died of disease than had died during the four months of war. Despite pleadings to be able to return to their homeland, some were sent to Washington State to live on a reservation there, some went to Idaho, and a few remained in Canada. Charles E. Wood, an aide to General Howard, summed up much when he wrote, *"I think that, in his long career, Joseph cannot accuse the government of the United States of one single act of justice."*

Id. (emphasis added).

If there is an American Indian leader one might think would strive for isolationism, for the apartheid appellant seeks, those unknowledgeable in what it means to be a true leader of his people would think it would be Chief Joseph. It is not.

Rather, he said as part of a longer speech the following:

> **I know that my race must change.** We can not hold our own with the white men as we are. We only ask an even chance to live as other men live. We ask to be recognized as men. *We ask that the same law shall work alike on all men. If the Indian breaks the law, punish him by the law. If the white man breaks the law, punish him also.*
>
> Let me be a free man--free to travel, free to stop, free to work, free to trade where I choose, free to choose my own teachers, free to follow the religion of my fathers, *free to think and talk and act for myself--and I will obey every law, or submit to the penalty.*
>
> *Whenever the white man treats the Indian as they treat each other, then we will have no more wars.* We shall all be alike--brothers of one father and one mother, with one sky above us and one country around us, and *one government for all.* Then the Great Spirit Chief who rules above will smile upon this land, and send rain to wash out the bloody spots made by brothers' hands from the face of the earth. For this time the Indian race are waiting and praying. I hope that no more groans of wounded men and women will ever go to the ear of the Great Spirit Chief above, and *that all people may be one people.*
>
> In-mut-too-yah-lat-lat has spoken for his people.
>
> YOUNG JOSEPH
>
> Washington City, D.C.

Young Joseph, ***An Indian's Views of Indian Affairs***, The North American Review, at 433 (Jan. 1879) (emphasis added).

It is time. In 1 A.D, the Nazarene was born: North America was populated with its indigenous aboriginal people. In 1607, we came, and started pushing the American Indian west. In 1787, we formed a new country that did not include the American Indian as a citizen.

In 1863, the Emancipation Proclamation came and went and the American Indian was not treated as if he were part of it.

In 1876, the Plains Indians made their "last stand" against the U.S. Cavalry's orders to herd them on to reservations.

In 1891, all resistance to being herded on to reservations was broken at Wounded Knee, South Dakota. Reportedly, as some of the cavalry killed men, women, babies, and young children with gun shot and saber, some were heard to say, "Here's one for Custer."

1896 came, and although the majority in ***Plessy*** only sanctioned black apartheid, the American Indian shared in the brunt of its brutal application.

1924 and the Immigration and Nationality Act, 8 U.S.C. § 1401(b), came. It is just that it did not make the American Indian full citizens. Rather it continued the federal-ward relationship which is now a dagger poised at the heart of Indian people.

1954 and ***Brown v. Board of Education*** came. Ironically, ***Plessy*** was not meant to **include** the American Indian, but did. ***Brown v. Board of Education*** in 1954 was not meant to **exclude** the American Indian, but did. At least it has been interpreted that way by some.

It is now ***anno Domini***, 1997, 390 years since we set foot, as outsiders, on Plymouth Rock. It is time.

History teaches us that when a group of people have been held down too long, oppressed too long by those who should protect them, the Hunter, Justice, emerges from the shadows and the silence, and then hunts patiently and mercilessly for its prey, injustice, and devours it.

Truth, Ogichida the Warrior, will always survive. It always has.



Judge R. A. Randall
February 11, 1997

Epilogue

My concurrence becomes a brief, an advocacy for social justice for Indian people. That is permissible. Judges brief a case, then advocate for justice every time they lift a pen. There are majorities, concurrences, and dissents; none advocate for injustice.

As I examine appellant's request to our court to address the core issue of sovereignty, I can appreciate the observation of George Konrád, the Hungarian patriot, at times called his country's most distinguished writer:

> I am writing my most hazardous book. I have been sentenced to examine myself. To dissect myself in the morgue of my own conscience. To understand without resentment, without self-justification. To describe what hurts, even if that means going *beyond the permissible*.

George Konrád, ***A Feast in the Garden***, at 4 (1989) (emphasis added).

Today, Minnesota Indian reservations are in various stages of mismanagement, divisiveness, and suffering the effects of past corruption. Some are close to death throes, as dissident groups battle for control, and no state or federal agency has the courage to take a decisive stand, take charge, and bring peace to the people.

The present version of "sovereignty" denying reservation residents the benefits of the Minnesota Constitution, the United States Constitution, its Bill of Rights, denying them accountability from tribal government and exempting them from constitutional obligations of due process imposed on the rest of America, is the filthiest piece of misguided patronizing racism this side of hell.

Konrád went on:

> Lord, give me the grace of veracity, and enlarge my memory. My philosophy can be found in what I did; it is written on my face. To the question, "What is the meaning of Life?", each man answers with his own.
>
> I'd rather be honest than virtuous. If virtue means the approval of my contemporaries for thinking what they think, I can do without virtue. Everyone is convinced that he is moral, at the center of the great hall of our consciousness, each of us sits in blossoming perfection.

Id. at 5, 6.

In the Nineteenth Century, the United States War Department and the buffalo hunters almost completed, but did not quite succeed in, the destruction of the American Indian as a people. The myth of sovereignty, if unexposed, will finish the job that our War Department and the buffalo hunters fell short of doing.

This opinion is not a criticism of any one person or any one thing. It is the truth. It is taken directly from public records. The truth I then coupled with analytical reasoning from precedent, from ***Cherokee Nation*** and its progeny, on forward to, most importantly, ***Brown v. Board of Education*** and its predecessor, Justice Harlan's monumental dissent in ***Plessy***.

There is language, I hope persuasive, on an issue of social justice. That is proper. From time to time on issues of social justice, persuasive language can include analogies, metaphors, and references to essays containing critical thought.

The language may seem strong, but so what. I read ***Brown v. Board of Education***. It seemed strong language to me. I read ***Dred Scott*** (it redefined the phrase "turgid formalistic prose"). It seemed strong language to me. I read the ***Plessy v. Ferguson*** majority. It seemed strong. Harlan's dissent seemed stronger to me, but apparently was too weak to convince even as much as one colleague. It took 58 years to be persuasive, but his place in history is secure. We know his name. Without looking it up, name me all the majority writers in ***Plessy***. Name me three? Name me one?

Is there a place for relentless and unrelenting dissents and concurrences on issues of social justice? There is. For years the United States Supreme Court on death penalty cases had systemic, institutionalized, and unrelenting dissents from Justice Brennan and from Justice Marshall. At times the two were joined by others.

In one of his last official acts as a member of the United States Supreme Court, Justice Blackmun did not suggest he might consider opposition to the death penalty in the future, he promised it! In ***Callins v. Collins***, Justice Blackmun stated in part:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules of substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

114 S. Ct. 1127, 1130 (1994) (Blackmum, J., dissenting).

I promised Indian people I would try to find a solution to the serious internal conflict on reservations today; conflict pitting Indian against Indian, Indian against non-Indian. I promised I would do that with the backdrop of the U. S. Constitution as the "safe harbor." I promised I would dig into the earth, the land of their ancestors, and try to find the "sword turned plow share."

Those who do not know Justice Blackmun may argue that he did not risk his judicial integrity when promising further relentless opposition to the death penalty. They will point out that he made the promise toward the end of his term on the United States Supreme Court.

I do not know Justice Blackmun to be a judge to break a promise. There are promises to keep.

STATE OF MINNESOTA

IN COURT OF APPEALS

C6-95-928

Scott County
District Court File No. C9501701

Short, Judge
Dissenting, Randall, Judge

Sylvia Cohen,

Appellant,

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,

Respondent.

Clinton Collins, Jr.
Janie L. Fink
Clinton Collins & Assoc., P.A.
821 Marquette Avenue
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Minneapolis, MN 55402

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Filed: February 13, 1995
Office of Appellate Courts

SYLLABUS

A business corporation created under tribal law, owned and controlled by the tribe, and operated for governmental purposes enjoys sovereign immunity. State courts have no subject matter jurisdiction over such a corporation under Public Law 280, 28 U.S.C. § 1360. In the absence of an applicable federal statute, state courts cannot assert jurisdiction over disputes arising entirely on the territory of an Indian reservation.

Affirmed.

Considered and decided by Randall, Presiding Judge, Short, Judge, and Peterson, Judge.

OPINION

SHORT, Judge.

Sylvia Cohen argues an Indian gaming casino is subject to the jurisdiction of Minnesota state courts, and the trial court erred or violated her due process rights by dismissing her personal injury suit against Mystic Lake Casino.

FACTS

On October 7, 1994, Sylvia Cohen entered Mystic Lake Casino in Prior Lake, Minnesota. As Cohen attempted to sit on a chair in front of a slot machine, the chair "snapped from underneath her," and Cohen fell to the floor. She claims the fall caused injuries that required hospitalization.

Cohen brought a personal injury action against Little Six, Inc. (LSI), d/b/a Mystic Lake Casino. LSI was created by tribal ordinance and is owned and controlled by the Shakopee Mdewakanton Sioux Community ("community"). The community is a federally-recognized Indian tribe, which operates under a constitution approved by the Secretary of the Interior. The casino is located on reservation land.

Without answering the complaint, LSI moved to dismiss on the basis of lack of jurisdiction. The trial court held LSI enjoys sovereign immunity, and dismissed Cohen's lawsuit for want of jurisdiction.

ISSUES

I. Do Minnesota state courts have jurisdiction over a dispute in which the sole defendant is a tribal business corporation, controlled by the tribe for governmental purposes, and the underlying events occurred entirely on an Indian reservation?

II. Does dismissal for want of jurisdiction violate Cohen's right to due process?

ANALYSIS

The jurisdiction of courts and the constitutionality of state action present questions of law, which we review de novo. *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (reviewing the trial court's jurisdictional rulings de novo); *see Estate of Jones v. Kvamme*, 529 N.W.2d 335, 337 (Minn. 1995) (evaluating the constitutionality of a statute de novo). We are asked to decide whether state courts possess jurisdiction over a tort claim brought against a tribal corporation, controlled by the tribe for governmental purposes, for injuries sustained on the reservation and whether dismissal for want of jurisdiction infringes on Cohen's constitutional right to due process.

I.

While sovereign immunity and lack of subject matter jurisdiction both deprive courts of the authority to hear certain matters, they differ in that parties may waive the former jurisdictional defect, but not the latter. *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05 (8th Cir. 1994).

A. *Sovereign Immunity*

Indian tribes have long possessed the immunity enjoyed by sovereigns at common law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58,

98 S Ct. 1670, 1677 (1978). While Congress has enacted many exceptions to the absolute immunity enjoyed by *foreign* sovereigns, these restrictions do not apply to sovereign Indian communities. *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 681 (1994); *see Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.) (refusing to apply "commercial exception" of the Foreign Sovereign Immunities Act to Indian communities), *cert. denied*, 116 S. Ct. 57 (1995); *see also* 28 U.S.C. §§ 1602-1611 (1988) (Foreign Sovereign Immunities Act of 1976). Absent a clear congressional or tribal waiver, common law notions of immunity apply to Indian tribes. *Sac & Fox Nation*, 47 F.3d at 1063 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) and *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677). Any waiver must be express and unequivocal and cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct at 1677 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 1503 (1969))).

Cohen argues the trial court erred in allowing LSI, a separate legal entity, to assert the tribe's sovereign immunity as a jurisdictional defense. However, case law establishes that a corporation organized under tribal laws, controlled by the tribe, and operated for governmental purposes can assert the tribe's immunity as a defense. *See, e.g., Elliott v. Capital Int'l Bank & Trust*, 870 F. Supp. 733, 733-35 (E.D. Tex. 1994) (dismissing, on immunity grounds, an action against a limited liability bank, which was chartered,

governed, and owned by an Indian tribe); *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23, 26 (D. Minn. 1974) (acknowledging tribes can confer immunity upon tribally-owned and -created corporations), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 378, 383-84 (Minn. 1979) (determining a tribally-created corporation fulfilling a governmental purpose was equivalent to the tribe, but lacked sovereign immunity because of an express waiver); *see also Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109-11 (Ariz. 1989) (holding a tribally-created corporation did not enjoy immunity because it was a simple business venture, having no responsibility for promoting tribal welfare or development). This approach is consistent with applications of the absolute common law immunity formerly enjoyed by foreign sovereigns. *See, e.g., In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum*, 13 F.R.D. 280, 288-91 (D.D.C. 1952) (recognizing a corporation's power to invoke sovereign immunity because it was organized under British law, was controlled by the British government, and served the government's purpose of ensuring access to oil). Even under the restrictive view of sovereign immunity, corporations owned by foreign governments are entitled to assert immunity unless they fall within an exception contained in the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1603(a) (a "foreign state" includes its agencies and instrumentalities), 1603(b) (an "agency or instrumentality of a foreign state" includes an entity in which the foreign

state holds a majority share). 1604 (a "foreign state" enjoys immunity unless it falls within one of the act's exceptions).

The record establishes: (1) LSI was created by tribal ordinance; (2) the community owns LSI's single share of stock; (3) members of the tribe's General Council may call special meetings of the corporation; (4) all community members may vote at LSI meetings; (5) LSI cannot exercise many of its powers, including approval of its annual budget, without consent of the tribe's voting members; and (6) LSI's purpose, as set forth in its articles of incorporation, is to "seek • • • to improve the business, financial, or general welfare of the Corporation, the Members of the Corporation, and the Community." Raising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose. Because the tribe created, owns, and controls LSI to further a legitimate governmental purpose, LSI is entitled to assert the tribe's sovereign immunity. *But see Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995) (considering LSI's activities nongovernmental in nature), *review granted* (Minn. Sept. 28, 1995).[1]

Cohen also argues operation of a gaming hall under the authority of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1988 & Supp. V 1993), is a waiver of sovereign immunity. However, that statute creates only a limited waiver. *See Maxam v. Lower Sioux Indian Community*,

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[1]However, under a common law sovereign immunity analysis, the activity's purpose, not its nature, controls the result. *See In re World Arrangements*, 13 F.R.D. at 288-91 (recognizing the immunity of governmental corporation because of the purpose it served).

829 F. Supp. 277, 281-82 (D. Minn. 1993) (holding the IGRA waives sovereign immunity for enforcement actions, but not suits for money damages); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 745 (D.S.D. 1992) (same); *see also Davids v. Coyhis*, 869 F. Supp. 1401, 1407, 1410 (E.D. Wis. 1994) (holding the IGRA *does not* waive sovereign immunity even for enforcement actions). LSI's operation of a gaming hall subjects it to a non-tribal court's authority to enforce compliance with the IGRA, not claims for money damages.

Cohen also argues the community waived sovereign immunity by registering as a foreign corporation in Minnesota. *See* Minn. Stat. § 303.13, subd. 1 (1994) (subjecting registered foreign corporations to service of process). However, appointment of an agent for the service of process waives only personal jurisdiction defenses, not sovereign immunity. *Canadian Overseas Ores v. Compania de Acero del Pacifico*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2nd Cir. 1984); *see Duluth Lumber*, 281 N.W.2d at 383 (holding that an entity subject to state court jurisdiction may still assert sovereign immunity as a defense).

Cohen further argues registration as a foreign corporation constituted a waiver of sovereign immunity because foreign corporations "shall be subject to the laws of this state." Minn. Stat. § 303.09 (1994). While that statute provides a means of gaining personal jurisdiction, it does not waive sovereign immunity. *See Rykoff-Sexton, Inc. v. American*

Appraisal Assocs., 469 N.W.2d 88, 90 (Minn. 1991) (applying the statute as a means of gaining personal jurisdiction); *State ex rel. Ohsman & Sons v. Starkweather*, 214 Minn. 232, 235-36, 7 N.W.2d 747, 748-49 (1943) (describing the statute's function as a method of achieving personal jurisdiction over a foreign corporation); *see also Canadian Overseas Ores*, 528 F. Supp. at 1346 (submission to personal jurisdiction does not waive sovereign immunity); *Duluth Lumber*, 281 N.W.2d at 383 (concluding that, even if the court otherwise had jurisdiction, tribal sovereign immunity might bar suit). Even if we concluded the statute amounted to a choice-of-law provision, there is no basis on which to find a clear and unequivocal waiver of sovereign immunity. *See American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-81 (8th Cir. 1985) (finding no waiver of sovereign immunity in a promissory note containing a choice-of-law clause). While a choice-of-law clause sets forth the rules governing the parties' duties and obligations, it does not constitute an explicit statement that the parties have agreed to submit disputes regarding those rules to adjudication in a particular forum. *See id.* at 1380-81 (implying courts should not transform a choice-of-law clause into a choice of forum). By registering in Minnesota as a foreign corporation, the community did not unequivocally waive sovereign immunity.

B. *Subject Matter Jurisdiction*[2]

By virtue of the United States Constitution, the federal government enjoys paramount authority over Indian tribes. *Williams v. Lee*, 358 U.S. 217, 219-20 & n.4, 79 S. Ct. 269, 270 & n.4 (1959); *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 520 (5th Cir.), *cert. denied*, 385 U.S. 918, 87 S. Ct 227 (1966). Thus, state courts cannot exercise subject matter jurisdiction over Indians or activities on Indian lands unless a federal statute provides for such jurisdiction, or the exercise of jurisdiction will not infringe upon Indians' right to self-governance. *Williams*, 358 U.S. at 220, 79 S. Ct. at 270-71; *Duluth Lumber*, 281 N.W.2d at 380-82.

Public Law 280 (28 U.S.C. § 1360(a) (1988)) provides Minnesota state courts shall, except with regard to activities occurring on the Red Lake Reservation, "have jurisdiction over civil causes of action between Indians or to which Indians are parties." While Public Law 280 applies to actions involving "Indians," this grant of jurisdiction does not apply to Indian *tribes*, thus preserving the vitality of Indian sovereignty and preventing the transformation of Native American communities into "little more than 'private, voluntary organizations.' " *Bryan v. Itasca County, Minn.*, 426 U.S.

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[2]Although the trial court never reached the question, LSI argues Minnesota state courts lack subject matter jurisdiction over this case. While we typically review only questions decided by the trial court, subject matter jurisdiction presents an issue falling outside of this general rule. *See* Minn. R. Civ. P. 12.08(c) (providing that a party may question subject matter jurisdiction at any time); *Berke v. Resolution Trust Corp.*, 483 N.W.2d 712, 714 (Minn. App. 1992) (resolving a claimed lack of subject matter jurisdiction raised for the first time on appeal), *review denied* (Minn. May 21, 1992).

373, 388-89, 96 S. Ct 2102, 2111 (1976) (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 718 (1975)). Thus, the federal statute's jurisdictional gap protects against infringement on the tribe's status as a sovereign. *See Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1139 (D. Alaska 1978) (construing Public Law 280 as having more in common with sovereign immunity than with traditional notions of subject matter jurisdiction). Under these circumstances, it would be illogical to impute the tribe's status to LSI for sovereign immunity purposes, but to prevent LSI from sharing other jurisdictional defenses designed to safeguard the tribe's sovereign status. *See In re World Arrangements*, 13 F.R.D. at 290-91 (allowing a British corporation to assert sovereign immunity because it was owned and controlled by Britain for a governmental purpose and, thus, was indistinguishable from the sovereign). As a consequence, we construe Public Law 280 as inapplicable to tribal corporate entities that are equivalent to the tribe for purposes of sovereign immunity. *See Bryan*, 426 U.S. at 388-89, 96 S. Ct at 2111 (holding Public Law 280 does not confer jurisdiction over *tribes*); *Duluth Lumber*, 281 N.W.2d at 378, 383-84 (treating a tribally-created corporation, serving a governmental purpose, as the tribe); *cf. Parker Drilling*, 451 F. Supp. at 1139 (holding a federally-incorporated tribe not to be an "Indian" for purposes of Public Law 280).

In the absence of a federal law authorizing state court jurisdiction, states may exercise jurisdiction over matters involving Indians if doing so will not infringe on their right to self-governance. *Williams*, 358 U.S. at 220, 79 S. Ct. at 270-71; *Duluth Lumber*, 281 N.W.2d at 380-82. If

jurisdiction does not attach under Public Law 280 and the disputed events occurred wholly within the confines of an Indian reservation, state court jurisdiction over the matter interferes with tribal self-governance. *Duluth Lumber*, 281 N.W.2d at 382. Because we conclude jurisdiction is unavailable under Public Law 280 and the events giving rise to Cohen's cause of action transpired wholly within the reservation, we lack authority to hear the merits of this action.[3]

II.

Cohen argues the jurisdictional immunities afforded to Indian tribes leave her without a remedy and, thus, violate her right to due process. We disagree. Cohen has not been deprived of her day in court, but only of her day *in the court of her choice*. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (finding no due process violation in the relegation of the plaintiff's claim to tribal court). Moreover, there is no state action that is necessary to a due process claim; the tribe's assertion of sovereign immunity is not an affirmative act, but a claim of status. *Greene*, 980 F.2d at 596. Similarly, a proper dismissal for lack of jurisdiction serves merely as recognition of the court's lack of authority to

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[3]Even if the trial court had concurrent subject matter jurisdiction over this dispute, federal policy would *require* it to abstain from acting with regard to the matter until after its final resolution in tribal court. *See Bowen v. Doyle*, 880 F. Supp. 99, 123, 127 (W.D.N.Y. 1995) (holding even if they have jurisdiction and the matter is not currently pending before a tribal court, state courts must abstain from hearing suits arising on reservations until after tribal courts have resolved the matter); *Smith v. Babbitt*, 875 F. Supp. 1353, 1366-67 (D. Minn. 1995) (stating a non-tribal court must abstain from hearing a matter arising on Indian land until the plaintiff has exhausted its remedies in tribal court).

act. *See Duenow v. Lindeman*, 223 Minn. 505, 511, 27 N.W.2d 421, 425 (1947) (quoting *Sache v. Wallace*, 101 Minn. 169, 172, 112 N.W. 386, 387 (1907) and stating subject matter jurisdiction is the "authority to hear and determine the particular questions the court assumes to decide").

DECISION

First, LSI may assert the tribe's sovereign immunity. Second, no federal statute authorizes state jurisdiction over this case and state court jurisdiction would infringe on tribal self-governance. And third, by dismissing this action for want of jurisdiction, the trial court did not violate Cohen's right to due process.

Affirmed.

12-13-95 Marianne D Short

RANDALL, Judge (dissenting)

A treaty is a contract.
A contract is a promise.

"The government made us many promises, more than I can remember, they never kept but one, they promised to take our land and they took it."

Red Cloud (Mahpiua Luta)
Oglala Lakota

> The government could not keep its own citizens out of the Sioux lands, any more than it had been able to keep them out of any other Indian treaty land, in spite of solemn pledges, since the time when the land just across the Appalachians was the West. It was now up to the Indian Bureau to find some way to legalize this latest trespass.
>
> . . . .
>
> Actually, there was no writing of treaties with Indian tribes after 1871, when the entire ridiculous pretense that tribes were sovereignties was abolished. It would be pleasant to be able to report that the change was made because common sense prevailed, but such was not the case.

Ralph K. Andrist, The Long Death: The Last Days of the Plains Indian 246 (1993) (emphasis added).

Justice Blackmun, in Puyallup Tribe, Inc. v. Department of Game State of Wash., expressed doubts about the "continuing vitality in this day of the doctrine of tribal immunity" and suggested that "the doctrine may well merit re-examination in an appropriate case." 433 U.S. 165, 178-79, 97 S. Ct. 2616, 2624 (1977)(Blackmun, J., concurring). Justice Stevens later declared the doctrine of sovereign immunity to be "founded upon an anachronistic fiction." Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 514, 111 S.Ct. 905, 912 (1991)(Stevens, J., concurring .

> Moreover, mere casual inquiry reveals that by and large the governmental powers actually exercised by contemporary tribal governments are those gratuitously granted by the federal government. Those powers are found in the Indian Reorganization Act of 1932, an Act of the United States Congress. Besides being severely limited in scope, those powers can be amended, or eliminated for that matter, at the whim of Congress. Thus, the governmental powers exercised by contemporary tribal governments are more illusion than real.

Robert A. Fairbanks, The Tribal Sovereignty More Illusion Than Real, **The Native American Press/Ojibwe News**, Nov. 3, 1995, at 4.

I respectfully dissent. As the majority sets out, appellant Sylvia Cohen was injured in the Mystic Lake Casino in Prior Lake, Minnesota. The casino is managed by respondent Little Six, Inc. (LSI), d b a Mystic Lake Casino. LSI is a branch and a part of the Shakopee Mdewakanton Sioux (Dakota) Reservation. Appellant commenced a standard personal injury action against respondent in the Minnesota District Court for Scott County, wherein the Shakopee reservation lies.

Respondent essentially asserts that the Mystic Lake Casino is an authorized branch of the tribal government of the reservation and thus asserts that the reservation is immune from lawsuits of this type, subject to certain narrow exceptions. It asserts that no such exception exists here.

Sovereignty I.

Respondent's primary defenses center around its contention that Indian tribes are "sovereign" and thus may exercise inherent sovereign powers, which include immunity from lawsuits, unless they expressly waive this "sovereign immunity" and consent to be sued

Respondent raises other arguments as well, all of which have the claim of sovereignty at their core. For example, it argues that the reservation's tribal court has original jurisdiction over this matter, if anyone does, and appellant must first take her claim to tribal court. Respondent additionally argues its casino is a tribal enterprise and that reservation's interests strongly outweigh the state's interest in providing Minnesota citizens access to Minnesota district courts for civil lawsuits. Respondent further argues that appellant's lawsuit impermissibly infringes on tribal interests that have been recognized by the federal government and that those tribal interests include an Indian tribe's right to protect its tribal assets, its culture, its identity, its religion or spirituality, and its right to self-governance and self-determination. All of these arguments are based on sovereignty.

Respondent concedes there are already many recognized inroads to this concept of "sovereignty." There may be federal and state jurisdiction over criminal matters on Indian reservations. Public Law 280, which includes the State of Minnesota, specifically confers certain jurisdiction on state district courts for incidents happening on reservations. See 28 U.S.C. § 1360 a) (granting Minnesota courts limited civil jurisdiction over actions "between Indians or to which Indians are parties" and "which arise in the areas of Indian Country".. Respondent argues that Public Law 280 does not apply to this set of facts because it, as a defendant in a personal injury lawsuit, is not an individual Indian, but is an

Indian tribal enterprise, and that Public Law 280, to date, has been construed to not include tribes within its purview. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 389, 96 S. Ct. 2102, 2111 (1976). Be that as it may, the already recognized exceptions to claims of sovereignty are incompatible with any belief that there is true sovereignty on Indian land. True sovereignty and true immunity from Minnesota state courts and this country's federal courts exists in Canada and Mexico, for instance. Our neighbors to the north and south are, in every sense of the word, true sovereign states or sovereign nations. The reason is simple. They are not in the United States. On the other hand, respondent is in Minnesota, on Minnesota and U.S. land, and the reason for that is simple. Respondent is a Minnesota corporation, its residents are all full-blown Minnesota citizens and full-blown U.S. citizens, and respondent and its residents are every bit a part of this state, a part of this country, as the rest of Minnesotans.

The majority notes that respondent, to buttress its claim of sovereign immunity, registered as a "foreign" corporation in Minnesota. Respondent accurately describes itself as "a corporation wholly-owned and operated by a federally recognized Indian Tribe (the Shakopee Mdewakanton Sioux (Dakota) Community)." I agree with respondent's characterization. If the Minnesota Secretary of State allowed filing as a foreign corporation, either because respondent is an Indian tribe, or because respondent incorporated in Delaware or some other state, but registered here to do business here, it changes nothing.

As respondent states, it is the Shakopee Mdewakanton Sioux (Dakota) Community. Although the Plains Indians moved around hundreds of years ago without regard to the political borders we call "states," respondent, a branch of the Sioux Nation, has its historical roots in Minnesota. Virtually all of Minnesota at one time was "Dakota Country." A few hundred years ago, the Anishinabe Ojibwe, after a protracted and fierce struggle, drove the Dakota people south and west out of central Minnesota. But respondent's official name, "Mdewakanton," which they bear proudly, roughly translates into "Dwellers of the Spirit Lake." Spirit Lake, or Mystic Lake, is Lake Mille Lacs. Thus, respondent is historically grounded in Minnesota. Its official name, Mdewakanton, meaning literally from the Lake Mille Lacs area of Minnesota, distinguishes it from other branches of the Sioux Nation. The Yankton (South Dakota), and other subdivisions of the Teton Sioux (as respondent is) are also historically grounded in identifiable areas in a particular state. The Minniconju Sioux (Teton) are associated with the Cheyenne River reservation (South Dakota); the Hunkpapa Sioux (Teton) with the Standing Rock reservation, which borders North and South Dakota; the Oglala Sioux (Teton) are associated with the Pine Ridge reservation in South Dakota, and so on.

Further, all residents of respondent, including respondent's board of directors, elected chief, and council members, are full-bodied residents of the State of Minnesota. They are entitled to vote in Minnesota, go to public schools if they choose, run for public office in Minnesota if they choose, and in every bit of the

term, are full normal Minnesotans. Minnesota owes them that. They are. Respondent's residents do not vote in state and national elections in North or South Dakota, or Iowa, or Wisconsin. They are not residents of those states. Regardless of what state respondent chose for incorporation, its reservation, its people, its casino at issue, its headquarters, and its home land are in Minnesota. Thus, I will continue to use the term Minnesota corporation to describe respondent. If another court should choose to call respondent a foreign corporation, it would change neither my legal analysis one line, nor history one day.

Continuing on, as Andrist said, "the entire ridiculous pretense that tribes [are] sovereignties" should have been done away with a long time ago. Andrist, The Long Death at 246.

During World War II and the Vietnam War, a test of sovereignty presented itself. Essentially, American Indians raised the issue of whether they were citizens of the U.S. subject to the draft or whether they were sovereign or quasi-sovereign inhabitants of a sovereign or quasi-sovereign reservation and, thus, not subject to the draft. The federal courts listened politely and then ruled immediately that American Indians were U.S. citizens subject to the draft. See, e.g., United States v. Rosebear, 500 F.2d 1102 (8th Cir. 1974) (holding that induction of Indian, who was United States citizen within the meaning of the Selective Service Act, is not precluded from military service by quasi-sovereignty of Indian nations, lack of full citizenship by Indian people, or treaty commitments); Williams v. United States, 406 F.2d 704 (9th Cir.

1969), cert. denied 394 U.S. 959, 89 S.Ct. 1307 (1969) (holding member of Western Shoshone Nation of Indians subject to Universal Military Training and Service Act and not exempt by Treaty between the United States and Western Shoshone); Ex Parte Green, 123 F.2d 862 (2d. Cir. 1941) (holding that even if treaty status between U.S. and Indian tribe were valid, Congressional action superseded the treaties and made tribe member a citizen for purposes of WWII military service); United States v. Cook, 383 F.Supp 353 (N.D.N.Y. 1974) (holding that appellant was subject to Military Service Act of 1967 even though a member of Six Nations of Indians); United States v. Craig, 353 F.Supp. 121 (D.Minn. 1973) (court found no inconsistency in recognizing certain unique Indian rights pertaining to modes of self-government, hunting and fishing rights and in deeming Indians to be citizens within the meaning of Selective Service law.)

I am not at all surprised by the result. I can only note that, in time of war, this country has accepted volunteers from true foreign or sovereign countries. But we have not been in the habit of involuntary induction, drafting against their will, bona fide citizens of sovereign nations.

It can be noted that during World War II, foreign born people residing in America, who had not yet been naturalized or in other ways attained citizenship, were subject to the military draft. But the point is still made, as those foreign born residents were drafted only because they resided in the U.S. We were not drafting tourists from foreign countries nor were we drafting foreign born

non-residents from foreign countries. We were drafting them because they lived here. In contrast, the American Indian's position was they could not be drafted off the reservation because it was sovereign or quasi-sovereign soil. That argument failed completely.

If during World War II and the Vietnam War we had drafted (with serious criminal penalties for refusal) sovereign or quasi-sovereign American Indians off of sovereign or quasi-sovereign non-American soil, and sent them to war, to fight honorably, to put themselves in harm's way, to suffer serious injury and death, I would like to be the lead plaintiff's attorney in that class action lawsuit. However, there never was nor will there be any such lawsuit because, in truth, we were not doing anything of the kind. We were drafting full-blown U.S. citizens, residents of the individual states, into the armed forces, to serve honorably along with all other draftable males regardless of race or color.

While overseas and under fire, the American Indian was accepted and fully integrated. Why, when he returned to this country, do we put him back on a private enclave, unlike all other returning soldiers of color, and tell him that as long as you stay there, you are on some sort of "sovereign soil?" To me, it is the cruelest kind of joke, to trumpet "sovereignty," as we do here, by forbidding appellant, a Minnesotan, from suing a Minnesota corporate entity in Minnesota state court; but in time of war, this great shield of sovereignty is exposed for what it truly is, a Potemkin Village.

Respondent's brief repeats a long line of federal and state cases discussing the issues of Indian sovereignty. One of the seminal cases that respondent cites in support of its position and one that has never been expressly overruled is Cherokee Nation vs. State of Georgia decided in 1831. 30 U.S. (5 Pet.) 1 (1831) Actually, Cherokee Nation sets the record straight. The case sets out unequivocally that Indian tribes are not true sovereign states or nations. Cherokee Nation labelled the tribes "domestic dependent nations." Id. at 17. Cherokee Nation is accurate when it uses the term "domestic" as, by definition, American Indian tribes are in the U.S., not a foreign country. Cherokee Nation is totally accurate when it uses the term "dependent". The federal government has made Indian tribes wards of government since this country was founded right up to the present. I suggest this acknowledged dependency is not compatible with any claim of true sovereignty. See Id. (stating "[t]heir relation to the United States resembles that of a ward to his guardian.")

The Indian tribes' virtual total dependence on the federal government for money, grants, permission to build this, permission to buy or sell that, permission to get into the casino business, etc., is exemplified by the partial federal government shutdown in late 1995 and early 1996. Articles appeared in various Indian and non-Indian newspapers detailing the hardships on reservations because of the slow down or shutoff of the Bureau of Indian Affairs and other sources of federal support.

The federal government views its obligations to Indian reservations as real and mandatory. In contrast, unlike how we view foreign aid to true sovereign nations as an optional decision of each Congress and President.

Respondent, with its successful Mystic Lake Casino, and the Mashantucket Pequot, with its successful Foxwood Resort and Casino in Connecticut, may be exceptions to tribal dependency. But these two tribal casinos, out of the few hundred now dotting this country, are true exceptions.

In large parts of this country, the rule for reservations is that poverty, lack of adequate housing, medical care, educational opportunities, and work equal or surpass that of many Third World countries. This problem is partially due to the continuous conflicts between state law, federal law, and tribal constitutions, with the end result being there is often is no true line to authority with the power to look into conditions and issues and rule with the force of law what has to be done to correct the situation. On the other hand, townships, villages, cities, counties, etc. in the State of Minnesota have a known rule of law, state statutes and the Minnesota Constitution, to operate under, and its citizens have a clear line to a neutral detached judicial body with the power to hear and redress wrongs. We call it the Minnesota District Court system.

If we are honest, we must concede that hopes for a thriving multi-million dollar casino like Mystic Lake or Foxwood on every reservation, to cure all ills, is no hope at all. There is no

guarantee the few eminently successful Indian casinos will have the ability forever to continue at their present levels. More importantly, there is absolutely no way that every single tribe in this country, large and small alike, will have a Foxwood or a Mystic Lake. The 50 states could not possibly absorb 500 to 2500 casinos of this type, of this size. We need to concede, because we must concede, that it would be impossible for all 50 states to have the equivalent of a Las Vegas and a Reno within their borders. That many casinos would kill each other off and drain vast amounts of money out of other businesses. The real issue is why are we putting the American Indian in a position where unless they get a successful casino off the ground, they remain in utter poverty. On some of the poorer Indian reservations in this country, their theoretical right to negotiate with the state for a gambling compact (providing they can entice outside investors and outside professional consultants into helping them in return for a large piece of the pie), would likely be traded for a chance at a real job, and a hot meal. Put another way, on what other class of our citizens do we impose the obligation to put up a gambling casino or some other economic enterprise before they are deemed worthy of the normal help and assistance we give to non-Indian Americans who do not have to first claim to be residents of some sovereign entity or tribe?

The truth of the matter is, Indian reservations and their inhabitants are semi-dependent or totally dependent wards of the federal government. This is reality. It is not sovereignty.

But somehow, through the years, "domestic dependent nation" has come to be used interchangeably with "sovereign state", or "quasi-sovereign state", or "sovereign tribes", and different variations thereof.

Thus, the core issue which needs to be addressed prior to developing the actual facts of this case and discussing other issues such as tribal courts, self-determination, and the unquestioned need to protect Indian identity, culture, spirituality, and dignity, is sovereignty.

Any hint in Cherokee Nation (if there was any), and any inference or outright statement in any of its progeny that purports to treat Indian tribes as sovereign or quasi-sovereign entities was mush when it was written, and is mush today. "Dependent," yes. "Sovereign," not now, not ever. I do not care what we have said or put in writing. Our actions speak louder than our words. Sovereignty is a phrase we have mouthed for over 200 years, but this country has never, at any time, treated Indian tribes with any of the courtesy, nor respect accorded a true sovereign state or nation, such as a Canada, Mexico, Great Britain, etc. None of the normal attributes of a true sovereign nation or foreign county has ever been gifted to, or attributed to, Indian tribes. Real sovereignty includes, without limitation, the right to seal one's borders, declare war, make peace, coin one's own currency, design and distribute one's own postage stamps, nationalize essential industries such as radio, telephone, communications, steel, oil, nationalize industries belonging to foreigners, control

immigration, set quotas, forbid emigration, apply for a seat in the United Nations, etc. Sovereignty is defined as:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.
>
> The power to do everything in a state without accountability,--to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

Black's Law Dictionary, 1251 (5th ed. 1979).

Indians and Indian tribes, on the other hand, have been treated by this country, at times, in a way that would not be countenanced by the Geneva Convention or any of its predecessor rules of war controlling the treatment of prisoners and combatants.

Cherokee Nation itself is instructive. It discussed the intentions of the State of Georgia to uproot the Cherokee Nation from its historical lands and bodily force it out of the state at gunpoint in violation of a treaty. The Cherokee Nation court indicated that there might be an injustice here, but solemnly concluded the poor Indians had no standing to sue and that the United States Supreme Court had no jurisdiction to hear their plea. In so holding the court stated:

> If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not

the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied

Cherokee Nation, 30 U.S. at 20

The Cherokee court did leave us with the following:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their county are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id. at 17 (emphasis added).

Following Cherokee Nation, and other cases solemnly discussing Indian sovereignty and right on through the rest of the 19th Century, as we pushed west to the Pacific Ocean, we either bought below the market price or stole virtually every acre of Indian land between the East Coast and the West Coast. During that time span, with dozens, if not hundreds, of state and federal court cases ringing with the solemn term "sovereignty", "domestic dependent nation", etc., this country was responsible for the Cherokee Trail of Tears in 1830; the Navajo Long Walk in the 1860s; the Sand Creek

Massacre at Washita River in 1864; the violation of the Fort Laramie Treaty of 1868; the lengthy battle against Chief Joseph of the Nez Perce in the 1870s, the Wounded Knee Massacre of 1890; and other similar actions, too numerous to mention (but can be looked up and verified), totally incompatible with any version of sovereignty. Look at what we do, not what we say.

Could this conduct be justified if individual Indians were true foreign nationals of a true sovereign or foreign state? The answer is, of course not. This country, at its worst, has always given some nod to the rules of war, even under the most trying of combat conditions. The history of Indian warfare lacks this nod.

The history of Indian "warfare" lacks even the pretense that we were warring against sovereignties, as Congress and the President did not bother to go through the formalized process of declaring war against the Indians that we went through in the colonial war for independence, World War I, and World War II. At one time anyway, the formalized process by which Congress and the President declared war was thought essential to our concept of honor. Indian warfare, including the intentional killing of noncombatants, women, and children, proceeded without this honor.

Could this conduct be justified because it was not until 1924 that the U.S. government got around to acknowledging that American Indians were official citizens of the United States? See Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 3, (now included in 8 U.S.C. § 1401). No, I do not think so. In roughly the same time frame, from 1800 to 1900, as we moved west and absorbed Indian

country, the great waves of immigrants came to the United States When they arrived, immigrants were all true foreign nationals of true foreign states. Although many, because of poverty, had to walk or ride by boxcars to homes and jobs, none were forcibly herded into boxcars at the point of a gun. None were taken hundreds of miles from lands that were concededly theirs and where they wished to live, to lands hundreds of miles away that were not theirs and where they did not wish to live. Only Indians.

The Fort Laramie treaty of 1868, and the history of the Black Hills, with its identity to the Plains Indians, particularly the Lakota Dakota Sioux, Cheyenne, Arapaho, are instructive, cannot be denied, and represent, oh so well, our treatment of Indians and Indian tribes as a so-called sovereign people. First of all, to get from the East Coast to the Black Hills in South Dakota, we broke, or unilaterally modified or ignored, in whole or in part, every treaty which, if honored, would have kept us on the east coast.

Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, (1903), on treaties is instructive. Like Cherokee Nation, this United States Supreme Court case has never been overruled. Lone Wolf states, in part:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be

availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Id. at 566, 23 S. Ct. at 221.

Lone Wolf makes short work of sovereignty, in the sense that a Canada, a Mexico, or a Great Britain are true sovereigns. Lone Wolf makes it clear that Indian tribes are not.

> After an experience of a hundred years of the treaty-making system of government Congress has determined upon a new departure,--to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes: 'No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.'

Id.

Lone Wolf repeats, not the sovereign status of Indians, but their dependent status:

> In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.
>
> . . . .
>
> It seems to us that this is within the competency of Congress. These Indian tribes **are** the wards of the nation. They are communities **dependent** on the United States.

Id. 187 U.S. at 565-67, 23 S. Ct. at 221-22.

Lone Wolf also put to rest any idea that the land beneath reservations is not United States soil, but rather, is land belonging to a foreign or sovereign nation:

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that is it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derive title from the Indians.

Id. 187 U.S. at 565, 23 S. Ct at 221.

Preceding Lone Wolf, we had Ward v. Race Horse, 163 U.S. 504, 16 S. Ct. 1076 (1896), telling us

> that 'a treaty may supersede a prior act of congress, and an act of congress supersede a prior treaty,' is elementary. Fong Yue Ting v. U.S., 149 U. S. 698, 13 Sup. Ct. 1016; The Cherokee Tobacco, 11 Wall. 621. In the last case it was held that a law of congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty.

Id. at 511, 16 S. Ct. at 1078.

I suggest Lone Wolf and Race Horse tell the truth.

Our attitude toward the Black Hills shows how we abandoned any pretense of the word "sovereignty" when it was deemed to be in our best interests. With the great expansion westward during the Civil War and post-Civil War era, a big public effort was made by the United States government and its military arm, the U.S. Army, to convince the Indians that westward expansion would halt at the Black Hills and that no further expansion into their territory would take place without their express consent. The Black Hills and surrounding territories, including parts of other states, were

recognized as Indian territory. As settlers moved west following the Civil War, the U.S. Army and a young cavalry officer by the name of George Custer were sent to the Black Hills to protect the Indians from illegal encroachment by white settlers, at least for a while. But when gold was discovered by the Army and some white prospectors in the Black Hills, the gold rush was on, and settlers, miners, prospectors, and land speculators began to pour into what was concededly Indian territory. The U.S. government and its military arm now had an important decision to make. Would it use the Army to protect the Indians from the illegal trespass, and in the process run the risk of having to injure, or even kill, white trespassers, or would the U.S. Army, in violation of the treaty, move into the Black Hills Indian territory and protect white trespassers, while running the risk of having to injure and possibly kill Indians. We made the obvious choice.

To argue there is any vitality to the word sovereignty is to ignore history.

America and the United States, had two chances to confer true sovereignty upon Indians. The first missed opportunity was not our fault. The second was. The first opportunity belonged to Columbus, who in 1492, because of a cloudy sextant, dropped anchor in the Caribbean, and loudly proclaimed that he had found India and was now going to trade. If he had gone ashore, looked around and tried to communicate intelligently with the native people living there, he could have ordered his crew back onto the ship and said, "Come on boys, this is somebody else's land. We are turning around

and going back to our home. We will tell other Europeans to stay in Europe." He did not do that.

The second time, the U.S. had the opportunity to confer true sovereignty on Indian people and Indian tribes and treat them as such. That opportunity came at the front end of our westward expansion. The Mississippi River, stretching virtually from the Canadian border south to the Gulf of Mexico and present day Louisiana was a recognizable, distinct and easily ascertainable border (just follow the river). At that time, there was even some discussion about recognizing it as a firm border between the U.S. and Indian country. But like all other discussion concerning Indian rights, it did not translate into action. We could have recognized the Mississippi as our national border just as we recognize the Rio Grande as the border between the southwestern U.S. and Mexico, or as the northern border between the U.S. and Canada is recognized. Then, whatever the Indian tribes did west of the Mississippi would have been their own business. They could have continued to roam free in small bands, or organized into counties, regions, or provinces. In other words, they would have had the same options citizens of Mexico and Canada have. But we did not. Instead, we did the following:

1851

Treaty of Traverse des Sioux. After years of mounting pressure from white settlers and facing huge debts to fur traders, the people of the Eastern Dakota Nation sign a treaty giving up all of their lands west of the Mississippi River. However, the U.S. Senate strikes out the provision granting the Dakota a reservation in Minnesota. Territorial governor Alexander Ramsey saves the deal by getting the president to allow the Dakota a reservation on a five-year lease. The Dakota are

relocated to a strip of land bordering the Minnesota River in west-central Minnesota.

1858

Dakota leaders on a diplomatic visit to Washington D.C. are told they did not own the reservation land. Faced with more debt and threatened with expulsion, they are forced to sell the northern half of their reservation.

Timeline of Events Leading Up to the Dakota Conflict and Exile, **The Native American Press/Ojibwe News**, Jan. 18, 1996, at 8.

Two of Minnesota's storied historical figures, Alexander Ramsey and Henry Sibley, were leaders in this land grab of Dakota Country by Minnesota.

Another article in this newspaper shows in stark detail how after the American Indian was pushed just west of the Mississippi River, the pushing continued unabated through western Minnesota, and all of South and North Dakota (Dakota Territory), continuing into Nebraska and Montana, and finally in 1871, a part of the few tribes remaining, particularly some of the Dakota Sioux, accepted the inevitable and fled north into Canada. They did not stick around to await the inevitable, which would have been getting pushed into the Pacific Ocean!

We had the chance to confer true sovereignty upon Indian tribes in the grasp of our hands. Instead, we opted for make believe sovereignty, as we have now, and pushed forward to the west with a governmental policy, that at times involved extermination and genocide, and at other times involved pushing the Indians west, south, and north, onto the most undesirable parts of the territory and states we developed. Today, there are a few tribes whose reservations contain some valuable oil, gas, mineral, coal, and

timber rights. The Navajo Diné, in New Mexico and Arizona, the Crow in Montana, the Cherokee in Oklahoma, to mention a few, do have in some places valuable natural resources. However, this is entirely due to accident, not by design.

Ralph K. Andrist, in his book The Long Death: The Last Days of the Plains Indian recounts in detail the period of westward expansion that I have just touched on.

I note that some of the precedent cited in the case before us mentions treaties as some sort of foundation for "Indian sovereignty." I join with Andrist in asking: Why did anyone pay attention to this "ridiculous pretense?" Honestly, I believe it is best that we do not bring up the term "treaty." My question would be, which one? I know of no major treaty that we have not broken. If the U.S. and its constituent states started talking seriously about treaties, I suggest we Indo-European Caucasians, African-Americans, and Asian Americans pack our bags, book passage on the next steamer, and head back to where we came from.

If treaties are to be honored then we are on someone else's land.

The final word on treaties is best expressed by the United States Supreme Court in Lone Wolf, when it states that when all is said and done, Congress has complete power over Indian tribal property and Congress can abrogate the provisions of an Indian treaty at any time. Lone Wolf, 187 U.S. at 566, 23 S. Ct. at 221.

Reading Cherokee Nation, Lone Wolf, and other federal cases solemnly discussing Indian sovereignty, as if it were a viable

issue. I feel as if I am in a time warp, reading Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), or Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, (1896), as if these cases were still the law of the land. I note that in Plessy, Justice Harlan, the lone dissenter, watching the Court give continued life to separate but equal by solemnly discussing whether colored people could be kept separate from white people as long as they were "kept equal" to white people, made the same observation that I make today watching the court's solemn discussion about Indian sovereignty:

> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

Id. at 559, 16 S. Ct. at 1146 (J. Harlan, dissenting).

If Justice Harlan were alive today, I suggest he would state that he did not write the dissent in Plessy. I suggest he would state that he wrote the majority, that he wrote the law of the land, but that it took the Supreme Court and this country 58 years, until Brown v. Board of Education decided in 1954, to realize it. See Brown v. Board of Education of Topeka, 347 U.S. 483, 495, 74 S. Ct. 686, 691 (1954) (holding "separate but equal" treatment of races is unconstitutional).

The parties here are all Minnesotans, and all Americans. That gets lost in the shuffle of sovereignty. Any argument that American Indians are different from the rest of us and, therefore, are sovereign or quasi-sovereign, and reside on sovereign or foreign land, is put to rest by our actual treatment of them, and

by the fact that in 1924 by the Citizenship Act, we conferred full U.S. citizenship on American Indians.

The State of Minnesota, and its residents, whether Indian or non-Indian, are not in any way, shape, or form a true sovereign. We might carelessly throw the term around, but in truth, we are not. We are individual citizens of a state that is part of a highly organized federation of states, comprising one indivisible sovereign, the United States of America. This state, and the other 49 components, might throw the term "sovereign" around at the quadrennial presidential nominating conventions, as in "the Great Sovereign State of Florida casts 42 sunshiny orange juice filled votes for candidate "x," the next great president of this here great U. S. of A." But after the convention we are all back to being just states within one indivisible country.

For instance, Minnesota is "sovereign or independent" of North Dakota, to the extent that on our election day, North Dakota residents (those who have no intention of changing that status), cannot pour willy-nilly across our border and vote in, or run for local and state office. But neither Minnesota as a state, nor its individual citizens, is sovereign to the point where its legislature/courts could, for instance, unilaterally declare us free of the draft should it ever be reinstated. Minnesota is not a true sovereign. The Minnesota legislature/courts cannot declare, for example, that any Minnesotan 18 years of age or older can run for president of the United States. Nor does the State of Minnesota and its legislature/courts have the power to rule that no

Minnesotan can ever be president. If we had such enumerated powers, we would be sovereign. We do not, we are not. The Minnesota Indian is right there with the rest of the non-Indian Minnesotans. We are all equally endowed with the same rights, the same privileges, the same obligations, and the same limitations.

I note that waiting until 1924 to "confer full U.S. citizenship on American Indians," has to redefine "irony". The earliest anyone else in this country can claim to have relatives born here is the 17th Century.

We took this land, by fire and sword, from its owners of record, the British, who took part of it from the Indians and the French. We then took all the rest.

Most U.S. citizens trace their ancestry back perhaps 50 to 200 years. Precious few insist they have blood lineage to someone who set foot on Plymouth Rock or at Jamestown. The Anishinabe/Ojibwe trace their roots in northern Minnesota back a few thousand years. Certain tribes in southwestern U.S. trace their ancestry back perhaps 10 to 12 thousand years. Whether Columbus or Viking explorers were the first European to set foot on this continent is of no consequence. The Hopi Village in northern Arizona, and the Acoma Pueblo "Sky City" in New Mexico compete for the title of the oldest continuously occupied town or settlement in the U.S. Both can show proof of an active civilization from approximately 800 to 900 A.D. to the present.

Put another way, to say that Columbus discovered America, is to state that Sri Lanka discovered NFL football.

Even the politically correct term we use today for Indians, which is "Native Americans," although accurate, is subliminally patronizing. If we feel a need to add the modifier "Native" to the term Americans, the rest of us ought to call ourselves "recently arrived" or "transplanted" Americans. If any modifier is needed preceding the term Indian, it ought to be "first American" or "real American" or "true American." That they have not been treated as such cannot deny the fact that they are. The doctrine of sovereignty that we are discussing today is a myth that never existed. Andrist and I agree, the reality of history cannot be ignored.

That American Indians should own this country, should be its true sovereigns, and would be, if history could be rolled back, is a more than an interesting issue. But history cannot be rolled back. We cannot land at Plymouth Rock and then turn around and go back east to our home. We can no longer stop at the Mississippi River, and we can no longer not occupy one foot west of it. We cannot give the Louisiana Purchase back to France and require France to give it back to the aboriginal indigenous people from whom they stole it. We cannot give Alaska back to the Russians and require Russia to give it back to the aboriginal indigenous people from whom they stole it.

Nor has it ever been seriously discussed, and I do not, whether we should undo the 1924 Citizenship Act and decide that since Indians are now not U.S. citizens, they ought to be afforded some kind of foreign national or sovereign status.

If one takes sovereignty to its natural and logical conclusion, would that mean when an American Indian immigrates off his or her reservation, would our Immigration and Naturalization Service come into play? Would Indians then need visas and passports to "come into town?" Then do we set quotas? Do we deny entry? That is exactly how we handle prospective visitors and/or immigrants from Europe, Central and South America, and other parts of the world. When you come to this country as a foreigner, a resident of a foreign or sovereign nation, you must come with an official status such, as a tourist with a passport and a temporary visa, or a work permit, or a visa for educational reasons. If you want to stay permanently, you are subject to quotas and depending on your job or occupation, your chances of gaining entry are either enhanced or decreased. With the American Indian, we do none of that. We ought not to, because we cannot. They are U.S. citizens and residents of an individual state.

I conclude we have to accept what we have done. We have to consider American Indians and their tribes as full co-equal citizens of both the United States and Minnesota. It sounds strange to say that, because of course, we ought to; they are full Minnesotans. Thus, what is strange to me, is that despite the overwhelming, undeniable fact that Minnesota Indians are full Minnesotans and full U.S. citizens, we still persist in treating American Indians on some sort of parallel tract, some sort of "separate but equal" treatment which we denounced in 1954 with

Brown v. Board of Education. I recall that Brown applied to all races and colors. I do not recall any exceptions.

Tribal Courts II

Respondent further argues that appellant's rights can be fully vindicated in the reservation or community tribal court. Upon examination, Indian tribal courts suffer from two serious deficiencies, one possibly correctable, the other lethal.

The correctable deficiency is that tribal courts are not organized. I speak now of the State of Minnesota, but the same deficiency applies to every state under the constitution of the State of Minnesota that frames our independent judiciary. That is, Article VI of the Constitution of the State of Minnesota. Tribal courts are also not subject to Article I, Section 4 of the Constitution of the State of Minnesota which guarantees to Minnesotans "the right of trial by jury."

Also, not all Indian judges in the State of Minnesota are attorneys licensed to practice law in the State of Minnesota (they do not have to be licensed because they are not under the jurisdiction of the Minnesota Supreme Court and the Minnesota Legislature). The various tribes with tribal courts retain the right to appoint whom they want. Respondent's attorney stated at oral argument that the tribal court judges for respondent's tribal court are attorneys. But if that be so for respondent now, it is not necessarily so for respondent in the future, and it is not presently so for the various tribal courts throughout this State.

At times in our recent history, Minnesota tribal courts have had non-lawyers as judges, have had lawyers who have passed the bar in other jurisdictions, but not Minnesota, and lawyers who have never passed any bar. Indian tribal courts, unlike all other courts in Minnesota, are not under the direct supervision of the Minnesota Supreme Court. Normally, a plaintiff or defendant anywhere within the four corners of the State of Minnesota, whether a resident or non-resident, has a straight forward set of Minnesota rules and statutes that can be counted on for uniformity. The same is not true in the Indian tribal courts where the makeup, composition, rules and regulations, attitude toward state and federal precedent, and decisions when to give a jury trial or not, can and do differ.

A recent issue of Judicature was devoted to Indian tribal courts and justice. See 79 **Judicature** 109, Nov.-Dec. 1995. The issue was aimed at promoting the concept that they are viable and somehow can exist alongside the already established state and federal judiciaries which provide a legal forum for all citizens (Indian and non-Indian). To read the magazine is educational, but to me does nothing more than confirm the complete injustice of attempting to subdivide American citizens by race and establish parallel race-based court systems. I do not speak now of conciliation courts or alternative dispute resolution, or "talking circles." These are all forms of delivering justice to our people that must to be encouraged if we are to survive without drowning in the sea of bitter litigation and the bitter emotions that follow

bitter litigation. What I am talking about is attempting to formalize a parallel Indian tribal court system purporting to have equal, and at times paramount, jurisdiction over state and federal courts.

The article entitled Resolving State-Tribal Jurisdictional Dilemmas is pointed, objective, and simply displays, at least to me, the insoluble incongruities, the justice denying anomalies that abound when we attempt to interject a third parallel race-based court system along side our two historical court systems. Id. at 154-56.

In commenting on the jurisdictional problems, the article notes the following examples:

> A non-Indian father is not prosecuted for misdemeanor abuse of his Indian child on an Indian reservation because the tribe lacks jurisdiction to prosecute non-Indians, the state lacks jurisdiction to prosecute offenses involving Indians and committed in Indian country, and the U.S. attorney lacks resources to prosecute misdemeanors.
>
> Tribal police decline to enforce a state domestic violence protective order recognized by the tribal court because they have no authority to arrest a non-Indian spouse for violating the order.
>
> . . . .
>
> A non-Indian spouse receives a default divorce and child custody decree in state court about the same time as the Indian spouse receives a similar decree in tribal court.
>
> . . . .
>
> These and similar occurrences are certainly fairly common and illustrate the problems inherent in limitations of tribal jurisdiction. Another hypothetical provides even more food for thought: Bonnie, an Indian, and Clyde, a non-Indian who resides with Bonnie in Indian country, rob the tribal casino, receive a speeding ticket

> in Phoenix, rob a convenience store in California, and trespass on the beach in Mexico. They could both be fully prosecuted by all jurisdictions in which they committed their offenses except the Indian tribal jurisdiction where they reside and where they committed the most serious crime. The tribe would only prosecute Bonnie for a misdemeanor and could not prosecute Clyde at all.

Stanley G. Feldman & David L. Withey, Resolving State-Tribal Jurisdictional Dilemmas, 79 **Judicature** 109, 154-55, Nov.-Dec. 1995.

Although I respect the right of Indian tribes to move for self-determination and will address that later in this opinion, I can appreciate appellant's lawyer's desire to have his client's civil suit involving issues of negligence and serious personal injuries, heard in a neutral state court with established known rules and procedures and a history of fair dealing.

This state, this country has the power to establish Indian tribal courts in total conformity with the laws of each particular state, and in total conformity with the rules controlling our federal judicial system. Do we have the will? If we deem Indian tribal courts essential, and deem it appropriate for them to have jurisdiction within the rules, over people of all races, so that people of all races have access and do not feel intimidated, we can set them up within the framework of the Minnesota small claims or conciliation court system. See Minn. Stat. §§ 491A.01-.03 (1994) (establishing conciliation court system). Such a system would give a litigant direct access to state district court following an adverse decision and then full appellate review by this court, with the right of petition to the Minnesota Supreme Court. A Minnesota

conciliation court gives any locality the option of handling small or local issues internally, but protects each party's right to at least one hearing de novo in state district court. We also have the power to set up a standard Minnesota district court, state or federal, as the Minnesota Legislature or Congress chooses, organized exclusively, or for the most part, with Indian issues and staffed with Indian personnel. There are zero controls or regulations forbidding governors and presidents from actively recruiting and appointing qualified minorities to the bench. Since approximately the 1970s, at both the state and federal level, qualified women and candidates of color have been actively recruited and appointed to correct imbalances on state and federal benches where the bulk, or at times all, of the appointees were white males. We have the power and the right to correct this imbalance. Do we have the will?

The deeper issue is why we are even talking about "Indian tribal courts" where a Minnesota non-Indian venturing onto a reservation, as appellant did here, can have her direct constitutional access to state district court derailed. Appellant might accept this different, and even perhaps arbitrary, treatment if she were a tourist in Canada or Mexico. But she is not a tourist anywhere in this lawsuit. She is a Minnesota resident, dealing with a Minnesota corporation concerning an accident on land in Minnesota.

There are parts of this country, counties, or regions in the deep south, parts of the southwest, and sections of our large

cities, where there are large concentrations of African-Americans, Hispanic, and Asian-Americans. For example, "Chinatowns" are viable and respected sections of at least two major cities, San Francisco and New York, that have been so identified for decades. In these areas, well over 50% of the inhabitants may belong to a particular race or ethnic background. Why do we not have "African-American courts," "Hispanic courts," "Chinese courts," or "Korean courts?" Why do we not have special court systems in those areas where outsiders, that is, nonresidents, do not have automatic access to that state's district court system for redress of wrongs, but must first submit their claim to a local or ethnic court? I suggest that if we tried to establish "racially based courts," the constitutional issue of the denial of due process issue, the race-related and race-baiting issues, and the ill-will and divisiveness that would follow would serve to overcome us as a country.

We try to go out of our way in Minnesota, and hopefully other states in the federal court system do as well, to ensure equal access and fair treatment to all people, whether plaintiffs or defendants, of any race, color, creed or ethnic origin. Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? To me, this is red apartheid. I believe this entire issue of "sovereignty" rests on true red apartheid. The American Indian will never be fully integrated into this state, nor into this country, until we recognize this "dual citizenship" for what it really is, a pancake makeup coverup of

Plessy which allowed "separate but equal" treatment. See Plessy, 163 U.S. at 551, 16 S. Ct at 1143 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).

No further cite, other than this reference to Plessy is needed. I can only note, "Haven't we learned anything?"

The lethal flaw of Indian tribal courts is that they are not independent autonomous bodies. The tribal courts are not independent of the executive and legislative branch of tribal government as is needed to ensure justice for the people who come before it. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and its progeny decided this a long time ago. Marbury is reference enough.

For a general review of tribal courts and the problems therein, and their differing formative stages throughout this country, I refer to Michael Taylor, Modern Practice in the Indian Courts, 11 U. Pudget Sound L. Rev. 231 (1987); The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 Am. Crim. L. Rev. 1279 (1994); Margery H. Brown & Brenda C. Desmond, Montana Tribal Courts: Influencing the Development of Contemporary Indian Law, 52 Mont. L. Rev. 211 (1991).

The essence, the sine qua non of tribal courts is that their existence rests on sovereignty. If sovereignty is exposed, there is no need for separate tribal courts. American Indians, like

American blacks, American whites, American Asians, are already guaranteed equal access to our state and federal court systems.

The lethal flaw, the lack of an independent judiciary in Indian tribal courts, results from the fact that all tribal judges, including respondent's tribal judges, are appointed by the executive legislative ruling body. The appointing authority for tribal judges might be called the reservation business committee, or the tribal executive committee, or the reservation board, or the community committee, but it is always the same. Those elected to run the reservation have full power to select, appoint, hire, and fire the judges. Tribal court judges may be "appointed" for a fixed term, but there is nothing inherently unconstitutional about their being fired or replaced in mid-term. They are simply not protected by the same constitution and the same rules governing Minnesota judges, not to mention the constitution and rules protecting the independence of federal judges.

The situation on reservations, including on respondent's, can be likened to a situation where the mayor and city council of St. Paul and Minneapolis select and appoint all the judges who have jurisdiction in those two cities. If there is to be county-wide jurisdiction, the county commissioners in those two counties select, appoint, set the salaries for, and hire and fire the judges. Judges in those cities or those communities, like all well-intentioned judges, would strive to do their utmost to deliver justice. But the perception of potential conflict, and the actual conflict, when the defendants in a lawsuit were the appointing

authority, is too big and too dangerous an elephant to ignore. In recent years in Minnesota, an Indian tribal judge in a lawsuit found for plaintiffs who were challenging the incumbents in a tribal election. The Indian judge found enough irregularities in the election to grant plaintiffs a hearing and limited discovery on the claimed election fraud. The incumbents, the executive legislative branch of the tribe, whose election was being challenged, appealed to an Indian appellate court who upheld the tribal judge. The reservation business committee then fired the tribal judge.

I subscribe to three Indian newspapers: **The Circle**, **The Native American Press/Ojibwe News**, and **News From Indian Country-The Native's Native Journal**. One is a weekly, and two are monthly. Virtually every issue for the past three or four years has contained editorials and/or letters to the editor from residents of reservations, or those with reservation rights living off the reservation, complaining about the perceived arbitrary use of power by reservation governing bodies and the failure of the Indian tribal court to look into, let alone correct, the alleged irregularities. One such editorial contained the following comment:

> And, most telling of all, the inability of the body politic of each reservation to rectify the corruption without the aid of the United States Attorney in collateral criminal proceedings proclaims to the State of Minnesota and the United States that at least two Minnesota Ojibwe reservations do not deserve the respect of a sovereign entity.

Robert A. Fairbanks, Leech Lake/White Earth Lawsuits Prove Disfunction of Tribal 'Sovereignty', **The Native American Press/Ojibwe News**, Dec. 14, 1995.

Another article contained the following:

> Seven members of the Turtle Mountain Band of Chippewa say their civil rights are being violated and want a federal judge to intervene in a year-long political battle.
>
> . . . .
>
> 'The tribal system is not providing remedies to members of the tribe,' said Lynn Boughey, a Minot attorney representing the seven. 'It's a state of anarchy.'

Turtle Mountain tribal Member to File Lawsuit Against Tribe, **Native Am. Press**, Feb. 2, 1996 at 1.

At times dissidents, out of desperation, have gone into the U.S. district courts for relief. That happened recently in Minnesota. A Minnesota federal district court judge ruled in October of 1995 that the federal government does have the power to overturn a Minnesota Indian tribe's vote to change its rules in such a way that would allow more people to share in the gambling profits than previously shared. See Shakopee Mdewakanton Sioux (Dakota Community v. Babbitt, 906 F.Supp. 513 (D.Minn. 1995). As one newspaper reported about the decision:

> The federal government has the power to overturn a Minnesota Indian tribe's vote to change its rules in a way that would allow hundreds of people to share profits from Mystic Lake Casino, a judge has ruled.
>
> U.S. District Judge Richard Kyle this week upheld a decision made in June by Ada Deer, director of the U.S. Bureau of Indian Affairs. Deer acted to nullify the referendum held in April by the Shakopee Mdewakanton Dakota Community.

> Questions were raised about the eligibility of some voters who stood to benefit financially from the rule change. Voters chose to waive blood requirements for descendants of current or former tribal members. Each member who is 18 or older is eligible to each receive about $500,000 a year in profits from the Prior Lake Casino.
>
> --Associated Press

Judge: Government Can Nullify Tribal Vote, **Minneapolis Star Trib.**, Oct. 26, 1995, at B-3.

Recently another newspaper reported:

> Tribal officials are not immune from prosecution in federal court for criminally violating the civil rights of their constituents, according to a recent U.S. District Court opinion.

Jeff Armstrong, Court Rejects Sovereign Immunity Claims of Indicted White Earth Officials, **Native Am. Press**, Feb. 2, 1996, at 1.

Coincidentally, the reservation in question, with the voter eligibility issue, is respondent. Assumedly, the present governing body of the Shakopee reservation can appeal that decision through the federal court system. But "so much for sovereignty" and the exclusive right of tribal courts to hear disputes arising on reservations. This is an issue involving the eligibility of voters just on the reservation. Nowhere else in Minnesota. If there ever was such a thing as a truly private tribal issue, this would be it. If there was ever an issue perfectly fit for the independent tribal courts of a sovereign nation to decide without outside interference, this would be it. To the contrary, a Minnesota federal district court has jurisdiction. Now consider that Minnesota federal district courts are not in the habit of hearing election issues arising out of local or regional elections held in

Canada or Mexico. I will not do any research on that subject. I will guess that Minnesota federal district courts do not hear election issues arising out of local or regional issues in Canada or Mexico because our courts have no jurisdiction, because Canada and Mexico are sovereign nations. I will guess that a Minnesota federal district court heard an intratribal election issue on respondent's reservation because the Minnesota federal district court had jurisdiction because respondent's reservation is on U.S. land and subject to federal jurisdiction. The land might be called reservation land, or "Indian Trusts Land," but it is undeniably in America, and part of the United States of America.

This is yet one more example of why there is no real sovereignty on reservations, including respondent's. What there is, is a continuation of this ward of the government status that the U.S. government has never been able to deal with. It would be intolerable in the 1990s to even consider a system whereby all white Americans or all black Americans, or all Asian Americans, were for no reason other than color and race, designated dependent wards of the federal government. But somehow on reservations we tolerate this.

For what other classification of U.S. citizens, by color or race, do we tolerate a government agency with control over our lives. We have a Bureau of Indian Affairs (BIA), but we do not have a Bureau of Black Affairs, nor a Bureau of White Affairs, nor a Bureau of Asian Affairs, with the power to give funds, withhold

funds, or permit people of that color to pursue a certain economic plan, but not others.

In speaking about our federal government's hope that somehow the BIA can make this all better without the necessity of really coming to grips with the issue of sovereignty, the myth of sovereignty as I and others call it, James Northrup, a noted Ojibwe writer and commentator from Northern Minnesota, recently had in his syndicated column, "Fond du Lac Follies" the following question and answer:

Question: Who invented the BIA?

Answer: Someone who really hated us!

The preservation of Indian tribal courts, without integrating them fully into our state and federal judicial system, is just one more bit of stark evidence that although we call Indians "Americans" (have to--they are), we treat them differently than we treat other Americans.

III. Preservation of Identity

The core issue, on which I agree with respondent, is that the protection of this tribe's (or any tribe's) culture, identity, assets, religion spirituality, and ability to live in its own way is paramount.

But I can only note that these are exactly the same goals for all people in this state, for all colors and all races.

Respondent's members are citizens of Minnesota and full U.S. citizens. They can be treated as such, and must be treated as such. But more importantly, we can protect them as citizens and

still protect their inalienable right to be different, as we do now with all other religions, races, colors, and ethnic groups. We do not have to pretend that Minnesota/American Indians are "sovereign" (which really means "wards of the government") to allow them to live as they want to live.

This country not only protects identifiable religions, but does so at a tremendous cost of hundreds of millions of taxpayer dollars, taken from individuals who in fact may not belong to any organized religion. We exempt from the normal burden of commercial and residential real estate taxes recognizable churches, synagogues, mosques, etc. This amounts to hundreds of millions of dollars of a direct subsidy by state and federal taxpayers to those who belong to certain religions. In addition, members of a recognized religion, or for that matter, non-members, can give contributions to a qualified religion and have a direct deduction against their income tax and the church does not have to report that money as taxable income. This is another form of direct subsidy of millions of dollars to organized religion. We do the same for non-religious eleemosynary organizations, qualified organizations, and foundations. We taxpayers subsidize outright individuals and business entities for profit. We do this through the form of tax breaks, tax subsidies, outright grants, government loans at low interest rates, or government loans at no interest to enterprise zones, and tax increment financing. In addition, we taxpayers subsidize areas and the people living in those areas, who qualify for state and federal relief due to calamities, such as,

fire, flood, drought, hurricanes, earthquakes, cyclones, etc. If you are a taxpayer not living in that area, you do not get the relief. If you are a taxpayer living within that area, you get the relief at the expense of other taxpayers.

State and federal governments subsidize townships, villages, school districts, cities, counties, and, at times, the federal government subsidizes states. We have the power, the ability, and the legal right to subsidize present day Indian reservations within the normal framework of how we treat other entities. Do we have the will?

Respondent wants a limited immunity to lawsuits to protect tribal assets. We do that now without calling the protected entity a reservation. In this state, townships, municipalities, local governments, etc., enjoy a limited form of immunity. We call it official and or discretionary immunity. It has been around for decades. At times different states have considered and put monetary caps on the dollar amount that can be recovered from a municipality in a tort lawsuit. This privilege can be afforded to wealthy municipalities, when individuals, even poor ones, have no such protection. There is nothing that Indian people are entitled to as human beings that cannot be afforded them through the normal process of accepting them as brother and sister citizens. We ought to, they are.

Self-Determination. IV.

Part of respondent's argument is that we need sovereignty to preserve economic self-determination and economic self-governance

for tribes. I agree with that goal. But it can be done completely under the framework of present Minnesota law. For instance, municipalities have for decades been able to own and operate municipal liquor stores. Municipalities, for approximately the last 20 years, have been urged, encouraged, and pushed hard by professional sport franchises to build, own, and operate stadiums suitable for professional football, hockey, baseball, and basketball. When municipalities and cities own professional stadiums and ball parks, the taxpayers subsidize wealthy investors (mostly white males in return for the promise of jobs and economic activity, such as bars, restaurants, and convention centers, in the hopes that tourists going through will spend two days rather than two hours in town. I do not think there is anything intrinsically evil about this. Whatever duly elected officials do, they do. I merely point this out to prove that we have the power, the right, and the precedent to allow Indian economic enterprises such as gambling casinos and other businesses to operate within the framework of existing state and federal law. Do we have the will?

If the taxpayers are asked, in various cities in various states, as they have been, to subsidize wealthy non-Indian investors, it cannot be said that it would be inappropriate for Indian casinos to continue to exist without the mirage that the land they sit on is "sovereign." Casinos provide <u>exactly</u> the same benefits that sports franchises claim they provide, i.e., jobs, economic development, and tourists who go slow rather than fast through the state.

This country has the power, the ability, and the will, to subsidize the wealthy, the poor, and the in-between. Farm subsidies are but one of many examples. It has been known for many years that a majority of the farm subsidies go to a small percentage of the larger, and thus, probably wealthier farmers in the areas of wheat, corn, sugar, tobacco, cotton, and peanuts. This opinion does not knock that concept and does not infer that this practice should be abolished. That is a decision for the will of Congress. I simply point out that we already have, and have had for decades, a legal framework to help people who need help (and some that don't) at the expense of the rest of us. There is nothing keeping us from, again within the framework of how we treat all citizens, calling Indian reservations economic enterprise, business, or disaster zones (I suggest "disaster zones" would be poetic justice). We can extend to reservations the same tax subsidies, outright grants, low interest loans, or zero interest loans, etc., that we now give to others. Our ability to subsidize American citizens and entities, regardless of color, does not stop there. We give, through the Internal Revenue Code, hundreds of millions to billions of dollars of tax breaks to national and multi-national corporations, particularly for mineral exploration (depletion allowance) and overseas investment and trade. Put another way, why do we have to go through the pretense of calling Indians and Indian tribes wards of the government and "sovereign" entities to help them exist?

If the question arises, can we protect their unique way of life if we bring them under the same big tent that the rest of us live under? The unqualified answer is yes. We already do. For example, the lifestyle, culture, and religion spirituality of the Old Order Amish is as specific, as culturally unique, and as different from mainstream America as any traditional Indian community, whether Ojibwe, Sioux, Cherokee, Navajo, Zuni, or Hopi. Old Order Amish in Minnesota, and in other states, live a lifestyle circa 1840-1880. Horse-drawn equipment, no electricity, kerosene lamps, lack of plumbing, a unique style of dress, and adherence to precepts that the elders of each community set are their way of life. The Amish in Minnesota are normal, full Minnesota citizens. They are normal, full U.S. citizens. They pay taxes on their land; they are entitled to go to public schools (they simply choose not to use them, but instead, maintain their own grade schools); they are entitled to vote in all elections; and they are entitled to run for public office (but choose not to). It is clear that in all ways they live a lifestyle as foreign to the rest of us, and as culturally specific a way of life, as found on reservations in this country where tradition, ceremonies and beliefs go back hundreds of years. Yet we are able to protect them.

Despite these vast cultural differences, this state, this country bends over backward to accommodate the Amish. We do not call them wards of the government. We do not call them a dependent nation. It would be laughable to suggest that they are sovereign or quasi-sovereign. They are just as standard a citizen as those

residing in Rochester, St. Cloud, Bemidji, or Hibbing, Minnesota But we do accommodate their way of life. To protect their way of life, the United States Supreme Court exempted the Amish from the normal requirement applicable to the rest of us that we attend public or private grade schools and high schools until an arbitrary age, often sixteen. Wisconsin v. Yoder, 406 U.S. 205, 234, 92 S. Ct. 1526, 1542 (1972). In creating this exemption, the Supreme Court noted that

> [t]he purpose and effect of such an exemption [is] * * * to allow the Amish their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose.

Id. at 234 n.22, 92 S. Ct. at 1542-43 n.22. Thus, the Amish are allowed to attend entirely unregulated home schools from the first through eighth grades. This is the United States Supreme Court speaking.

The Minnesota Supreme Court in State v. Hershberger specifically exempted the Amish in Minnesota from the normal requirement applicable to the rest of us that orange triangles adorn the back of their horse-drawn buggies and farm carts to signify a slow moving vehicle. See State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990) (statue requiring display of slow-moving vehicle emblem violated freedom of conscience rights protected by Minnesota Constitution when statute was applied to Amish defendants, who held sincere religious belief against use of emblem, where state failed to demonstrate that both freedom of conscience and public safety could not be achieved through

alternative means of Amish defendants' use of white reflective tape and lighted red lantern).

I state the above simply to point out that this state, this country, has the power and the legal right to protect any and all parts of Indian identity, culture, tribal assets, self-determination, religion/spirituality that needs to be protected, and yet do it all within the framework of treating American Indians like we treat ourselves, as normal citizens of this state, of this country. The real issue is, do we have the will?

Duality v. Acceptance. V.

The heart of the issue, to me, is that we have refused the painful, begrudging acceptance that "we are Indians, Indians are us," as we have had to accept, with painful, begrudging acceptance, the not-to-be-denied idea that we are African-Americans and Asian-Americans, and African-Americans and Asian-Americans are us.

From the moment the Mayflower dropped anchor, until this very date, we have persisted in a dual America. One America for the American Indian, the red race, and a separate America for the Indo-European Caucasian, the Afro-American, the Asian-American, the white, black and yellow race.

We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure, that we must grit our teeth and work through it.

Examples of failure abound. For a brief time following the outbreak of World War II, we had a dual America, one for the rest

of us and one for the Japanese-Americans living on or near the west coast. All of the rest of us, and Japanese-Americans in the central and eastern part of the United States, could move and live at will. Japanese-Americans living in the west coast area could move or live at will, as long as they moved or lived in Japanese relocation camps. This was done with the full pomp and circumstance and authority of the U.S. government, backed by the full judicial authority of the U.S. Supreme Court. After a mercifully few short years, this practice was discontinued. Fifty years later, the U.S. government said that the practice was wrong and Congress appropriated a sum of money to identifiable descendants of those camps. Was this Asian American duality in the U.S. wrong? I can only state that when our government, with its propensity to stonewall, with its tradition of announcing that winners of a war can be guilty of no wrong, just the loser, announces that it did wrong, that it is sorry, and pays money, well, America, we were wrong. At rest now, is acceptance of the fact that a dual America for west coast Japanese-Americans and the rest of us was wrong.

In our history, we had another, much longer dual America. For approximately 90 years we had one America for white citizens and a second America for black citizens. Following the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution were quickly enacted. As a result, all white citizens and all blacks now became "full" citizens. Yet for approximately 90 years, this country officially sanctioned and

officially practiced segregation. We had decades of black apartheid. Even 30 years after the enactment of those three amendments, the United States Supreme Court in Plessy held that, at least as to intrastate travel, separate but equal was still constitutionally permissible, proper, and in all things legal. Plessy, 163 U.S. at 551, 16 S. Ct at 1143. My previous reference to Judge Harlan, the lone dissenter, calls for a further examination of that case (supreme law of the land for the following 58 years). Harlan's dissent said in places:

> But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights of which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.
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> * * * *
>
> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Id. at 554-57, 16 S. Ct. at 1145 (emphasis added).

I can only hope that Justice Harlan's candor as to black/white duality will be recognized for its inherent truth and applied to our present duality where our white, African-American and Asian-

American citizens on the one side enjoy the U.S., while on the other, and the bottom side, we have the American Indian.

Justice Harlan further said:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Id. at 559, 16 S. Ct. at 1146.

Until we accept the truth, the truth being that we impose this duality today on American Indians, The Pledge of Allegiance, which is supposed to read

> I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all; (Emphasis added.)

instead reads

> I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, divisible into two classes of colors, one class is black, white, yellow, and the second class is red, with liberty and justice for all according to the above duality.

Between Plessy v. Ferguson in 1896, and Brown v. Board of Education in 1954, the United States continued to have its own form of a dual America, with our own form of black apartheid. Jim Crow laws were alive and well, openly in parts of this country (and subliminally in parts of others) through the tens, the twenties, the thirties, and the forties. It wasn't until approximately 80 years after the Thirteenth, Fourteenth, and Fifteenth Amendments were enacted that President Harry Truman, by executive proclamation, officially integrated the U.S. armed forces. The

legally permissible principle of separate but equal, an undeniable form of black apartheid, persisted until 1954 and Brown v. Board of Education. At that time, the federal judiciary had a perfectly readable and articulate precedent called Plessy v. Ferguson to follow. It would have been easy to build on the underpinnings of Plessy. Plessy indicated that as long as there was equal but separate accommodations for white and colored, and as long as nobody could be denied a berth in one or the other, states could opt to do it.

Basically, Brown v. Board of Education was carved out of whole cloth. Despite precedent, the U.S. Supreme Court said in 1954 (inventing new law), "We just aren't going to do this any more. It is wrong. It was wrong. We don't care that we used to say it was okay. It is not okay. We are going to change it."

There was an immediate hue and cry from many members of Congress and from many states decrying this as a violation of "state's rights". Congressional action to overturn the case was discussed by a few; many legislative assemblies and state houses said "never" and set about various schemes and artifices to negate the ruling. But whether the Oval Office liked it or not, the executive branch of the government set in force the needed justice department and military machinery to implement the dictates of Brown. The struggle was long, violent, and marked by bloodshed and death for the next decade, and finally, in the 1960s, civil rights and voting rights legislation put an end to the thought, held by a few, that although government and courts might say no to duality

between Americans of a different color, devious ways could be devised to perpetuate the practice. We just do not allow that any more.

We have the power and the right to end the present system of red apartheid in this country, of wardship and of dependency, all cloaked in the myth of sovereignty. But, do we have the will?

Morton v. Mancari attempts to sidestep the bitter truth that Indian sovereignty is a race-based classification by stating that it is not race based, but is rather a "politically based difference."[1] 417 U.S. 535, 553 n. 24, 94 S. Ct 2474, 2484 n. 24 (1974)(stating that preferences for American Indians are not racial but political when the preferences apply to members of federally recognized tribes).

Today, I still conclude the result reached in Red Lake School District was just and equitable. The entire school district was within the Red Lake Ojibwe reservation and the entire student body were residents of the reservation. But I no longer accept that part of the reasoning wherein Morton held that Indians are a political class, not a race or an ethnic class. If that were the case, those in Congress who were bitterly opposed to Brown v. Board of Education would have thought of the simple expedient of calling black Americans a political class, rather than a race-based class.

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[1] I have cited to Morton v. Mancari myself in Krueth v. Independent Sch. No. 38, Red Lake, when this court held that a preference for Indian Teachers with junior seniority to non-Indian teachers was appropriate under state law. See Krueth v. Independent Sch. No. 38, Red Lake, 496 N.W.2d 829 (Minn. App. 1993), review denied (Minn. Apr. 20, 1993).

and merrily continued on their way with de facto segregation. If this country is to meaningful deal with the consuming problem of race and race bias, we have to be smarter than that; we have to be more honest than that.

VI. The Economic Reality of Mystic Lake Casino

Respondent, a corporate defendant in this personal injury lawsuit, urges that allowing appellant to proceed in state district court would interfere with its casino business, interfere with reservation tribal business, and interfere with its "self-determination." When examined in the light of the economic realities of respondent, this argument is a non-issue. Mystic Lake Casino no more needs this preferential treatment than does a Cargill, a Dayton-Hudson, or a 3M.

Mystic Lake Casino is a full-fledged gambling casino grossing hundreds of millions of dollars per year. It took a few years of planning, and millions of dollars to construct. Its marketing plan from day one, and this must be conceded by respondent, or respondent is without candor, was specifically and solely designed to attract thousands of non-Indian visitors per day, thousands of non-Indian visitors per week, and hundreds of thousands of non-Indian visitors per year. Mystic Lake Casino has, to date, been successful in attracting hundreds of thousands of visitors/gamblers from off the Shakopee reservation; visitors from the metro area, visitors from around the entire State of Minnesota, visitors from out of state, and visitors from foreign countries.

Respondent's reservation contains somewhat less than 200 members. Respondent argues it is entitled to limited sovereign immunity because the casino is a "tribal enterprise." To call Mystic Lake, the largest casino in Minnesota and one in size that compares favorably with large casinos in Las Vegas and Atlantic City a "tribal enterprise," is like calling the Mall of America in Bloomington "a smallish Bloomington strip mall." The Mall of America, although available to Bloomington residents, was specifically designed and built with a marketing plan in place to attract shoppers from the entire metro region, the entire State of Minnesota, from all our neighboring states, from virtually the entire country, and from overseas. So, too, was Mystic Lake.

If Mystic Lake were truly a "tribal enterprise," if it had not been designed, built, and specifically marketed to attract hundreds of thousands of non-Indian visitors from around the state, from around the country, it would, with its millions of dollars tied up in a building, gambling machines and fixtures, go broke in four hours, would be in Chapter 7 bankruptcy in six.

Mystic Lake's size, its scope, and its marketing plan are not accidental. They are intentional, and well done. It is a highly successful business enterprise. But it is decidedly not tribal, not local. To the contrary, it is a business designed not for the use of reservation residents, but instead, designed and marketed for non-Indian users without whose patronage it would fail immediately.

I conclude that the intentional design, size, and marketing plan of respondent constitutes a clear, express waiver of any so-called limited right not to be sued by its patrons in the appropriate Minnesota district court.

Oddly enough, under Public Law 280, if the defendant were an individual resident of respondent, he or she could be sued by appellant. Why does "sovereignty" not protect the individual Indian, a person with dignity and a life, but instead only protects a soulless corporate shell that does not need the protection? Arguably, the individual Indian deserves more protection than respondent corporation.

The cost of a basic Owner's/Landlord's liability insurance policy might be fairly expensive, given the amount of foot traffic. However, this cost is no more a burden than all other Minnesota businesses, great or small, bear.

The sovereignty issue gets muddled worse in tort cases, as we have here, than it does in contract cases, when you study the difference between "sue and be sued" versus "sue and consent to be sued" clauses. When one contracts with an Indian reservation, there is an issue as to whether the tribal constitution and/or bylaws contain a "sue or be sued" clause, which acts an express waiver of sovereign immunity, or whether it contains a "sue and consent to be sued" clause, which does not act as an express waiver. See Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989)("sue and be sued" clause in tribal corporate charter is an express waiver of sovereign immunity).

First of all, if there is no "sovereignty," the issue is moot. If you sign a contract and don't perform, you can be sued, and then given a chance to explain your actions. But even allowing for the myth of sovereignty, a contract case can be looked at differently. If one contracts with a reservation and assumes its definition of sovereignty, and signs a contract in writing that contains a "sue and consent to be sued" clause in favor of the reservation, when one suffers for that, you have only yourself and your law firm to blame.

That is decidedly not the case in the area of tort law. None of the hundreds of thousands of daily visitors, like appellant, are sat down at the front door, before plugging in their three nickels in search of the elusive "Wild Cherries," and given a written contract with bold face print, not fine print, that spells out clearly and unequivocally the following information:

> You are on an Indian reservation. We claim this is a sovereign enterprise on sovereign land. If you do not understand that, please consult your attorney. By remaining on these premises after you have read this notice, which you will sign at the bottom, you agree to accept our following terms and definitions. We can sue you if we think we have a case. You cannot sue us in state district court if you think you have a case unless we consent to be sued in state district court. We retain the option of forcing you to start your case in our tribal court, and we appoint the judges and make the rules for our tribal court.
>
> Also, be aware that this casino may or may not be subject to the Americans with Disabilities Act, may or may not be subject to OSHA regulations, may or may not be subject to state and federal laws prohibiting discrimination and harassment in the area of gender, race, color, and creed. We state that we are sovereign and we state that we can decide to abide by the above rules or we can decide not to abide by the above rules, but no one will tell us what to decide because we claim we are sovereign.

The above is an accurate statement of the position taken by Indian casinos around this state and around the country. Some voluntarily conform to the above laws and regulations, some neglect to conform, some conform only in part, but all insist that they, and not an individual state or the federal government, will dictate to which state and federal laws they feel bound. Obviously, Mystic Lake Casino would not insist that every single person coming through the door sit down, read the statement, and then sign it before being allowed to gamble. This would have a tremendously negative impact on the number of people coming to gamble. So none of the visitors, including appellant, have carefully contracted away their right to sue. None have carefully read and accepted respondent's viewpoint on sovereignty.

What is happening here is that appellant becomes the sacrificial lamb for America's 220 years of benign neglect, and intentional neglect (including active warfare at times), of the various Indian tribes that populate, or used to populate, this country. Rather than deal with this duality, this red apartheid as I call it, we pretend there is such a thing as sovereignty, and as compensation for past wrongs, we state that appellant, a Minnesota citizen, cannot sue a Minnesota corporation in a Minnesota state court for an accident in Minnesota.

The one court that has gotten this issue right to date is the Montana Supreme Court, in Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994). In Lambert, an enrolled member of an Indian tribe brought a personal injury action in Montana state district court against a

non-resident motorist for injuries arising out of a car accident that occurred within the boundaries of appellant's tribal reservation. The defendant motorist moved to dismiss the action "for lack of subject matter jurisdiction." The district court dismissed the lawsuit, believing it was guided by precedent that stated the jurisdiction of the tribal court pre-empted the jurisdiction of the state district court.

The Montana Supreme Court made short shift of the argument and stated flatly that plaintiffs (Montana Indians), as full Montana citizens, had an absolute right under the Montana Constitution to sue non-Indians in Montana state court. The court said that the failure to recognize this right to sue would deprive an Indian plaintiff of due process and equal protection of the law under the Montana Constitution. Id. at 380.

Minnesota bestows a similar constitutional guarantee of the right to have a jury trial in a Minnesota state court. See Minn. Const. art I, § 4 (stating "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy").

Appellant here, subject all day and all night to being sued in state district court by an individual Indian from Shakopee, or by respondent itself, is being denied that Minnesota constitutional right.

The Lambert court did, in its analysis, recognize a previous case which found in favor of an Indian defendant who wanted to defend himself in tribal court instead of state court. Lambert,

886 P.2d at 380. That part of the analysis was collateral and unneeded for the its core holding. I suggest the Lambert court simply needed that part of its analysis that recognized the inherent injustice of allowing "sovereignty" to stand in the way of a Montana citizen's right to sue in a Montana court. Applying the Lambert analysis to appellant's rights in this case, the inconsistencies of respondent's position abound. If appellant had negligently hurt a blackjack dealer or a coin changer, that person could sue appellant in state district court. Yet, we say appellant cannot sue respondent in state district court when she was negligently hurt.

Assume that in the parking lot of respondent, appellant, with passengers in her car, collided with a vehicle belonging to the Mystic Lake Casino and being driven by a tribal member. The driver could sue appellant in state district court. The passengers in appellant's vehicle could sue appellant in state district court. Respondent could sue appellant for property damage in state district court. Are we to say that appellant, for her own injuries, has to counterclaim against the driver, and cross-claim against him for injuries her passengers received, in tribal court?! Do we have parallel lawsuits? What if this lawsuit and/or appeal from state district court finds negligence on the part of the driver of the reservation car, but the judgment in tribal court finds negligence on the part of appellant. Whose judgment is higher? Whose judgment gets enforced?

Our case today is founded upon a claim of "sovereignty" which does not now exist, nor has ever existed, in any true sense of the word. Even Cherokee Nation acknowledged the lack of true sovereignty on the part of Indian tribes. Somehow the word crept into our vocabulary. I suspect it crept in as a pacifier for unrighted wrongs against Indian people, against Indian tribes.

The tribal courts throughout this state, throughout this country, are not a reliable and predictable forum for citizens to sue each other in, nor a place to seek redress and due process. If there is a need to preserve an Indian tribal court system, I have no quarrel. This state, this country, is moving toward an era of alternative forums for dispute resolution. But to wipe out the racial bias our Minnesota Supreme Court declared found in our court system, an Indian tribal court must be open to all, organized pursuant to the Minnesota statutes controlling conciliation courts, district courts and appellate courts, and organized under the auspices and rule of the Minnesota Supreme Court regarding the training and discipline of attorneys and judges.

Anything less would be a pure race-based distinction, and no Minnesotan, regardless of color, not volunteering to enter a court system based on race and take their chances, should be forced to do so or lose their right to sue. But this is precisely what respondent urges on this court. I disagree strongly. It is difficult to sanction a Tribal Court and declare it to have jurisdiction over Minnesotans, both Indian and non-Indian, when the Tribal Court is a pure race-based classification. The appointing

authority for the judges of the Tribal Court is the Reservation Business Council, which is, by definition, composed only of those meeting a race-based qualification. This Council may, if they choose, appoint non-Indian judges to the Tribal Court, but they reserve to themselves the right to make appointment to the Tribal Court a race-based classification. In addition, the Reservation Business Council, if respondent's position is accepted, retains the right to sue other races (non-Indian) in Minnesota district court, but then has the power to declare that other races (non-Indian) do not have the right to sue respondent in Minnesota district court, unless respondent first consents.

How do we accept the incongruity, the injustice, that residents of respondent's reservation, and respondent itself, have the option of exercising their Minnesota constitutional right to sue initially in state district court, but that appellant does not? She is, like they, a Minnesotan resident.

The truly important goals of protecting Indian culture, Indian spirituality, self-determination, their freedom, and their way of life can be done within the same framework and the same system, by which we treat all other Minnesotans of all colors. This country has failed miserably at maintaining dual Americas. At one time, we maintained one America for white and one for certain Japanese-Americans. At another longer time, we maintained one America for white Americans and another America for black Americans.

For some reason, we continue to insist that American Indians can be the last holdout, a race that is not entitled to be brought

into the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. "Sovereignty" is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.

Like Justice Harlan, the dissenter in Plessy, I am out of excuses and simply can no longer defend the status quo.

The most attractive and compelling argument made by respondent is that they need this sovereignty for Indian "self-determination" and Indian "self-governance." When we read and hear this phrase, all of us, like myself, who push for the self-determination and independence of all, particularly the poor and the formerly poor, would think it to be a great argument and reason enough to continue the myth of sovereignty. That is, unless we look into the very phrase itself and say, "Self-determination for whom? Don't all residents of this state already have it to the same degree as all others? Are not members of respondent's tribe residents of this state?"

All bona fide residents of Minnesota, of all races and colors, enjoy identical opportunities for self-determination and self-governance. All of us enjoy the same access to public schools. All of us of voting age enjoy the same access to the polls. All of us of electable age and with no legal disability enjoy the same opportunity to run for office. None of us can be denied an opportunity to apply for a job, or be kicked off a job, if we have one, purely because of race or color. Those same guarantees

already do, and must, apply (whether you live on a reservation or not) to all American Indians in Minnesota. Minnesota Indians, like the rest of us, are Minnesota citizens.

Why is there this need to single out a class of people by race and give them a "double dose" of self-determination, and self-governance? Without this fiction of sovereignty, they still have every right we possess, every right that the State of Minnesota can give. Are American Indians entitled to "more self-determination" than Minnesota gives to its other residents? I am not sure how this could be. How can a state give more than it possesses?

If this is deemed a federal issue, how does the federal government give more than it possesses? Under the United States Constitution, all citizens of this country of all races already enjoy the same rights and the same access to the federal court system to enforce those rights.

Why does the federal government select one class of people by race and feel it necessary to give them "double self-determination and self-governance." Double in the sense that they have the rights of all U.S. citizens, but now there is supposed to be another right because they are Indians? Does that make Indians separate but equal? I suggest that Brown v. Board of Education will tell us this is a bad idea, a vicious and humiliating idea.

Do we label Indians "separate but more equal?" That would not personally bother me, as the American Indian is entitled to some pay back for our treatment of them since this country was founded. But, can we really single out a class of Americans by race and deem

them separate but more equal, without running into the same vicious firestorm of hate and divisiveness that prompted the Brown Supreme Court to state that the Plessy Supreme Court was all wet, all wrong, and cry out, "we aren't going to do that any more."

Do we label Indians "separate but less equal?" I suggest that one will not get off the ground if "separate but equal" cannot.

This case, this issue, is not about who can round up the most dried out musty federal precedent[1] for one side or the other. This case, this issue, is about the future of the United States, and the future of the American Indian. This case is about whether we accept the American Indian as a full U.S. citizen, a real American, or whether we will continue to sanctify tiny enclaves within a state and tell the individual Indian that if he or she stays there and does not come out and live with the rest of us, we will bless them with the gift of "sovereignty."

In all honesty, I am satisfied that respondent, respondent's attorneys, and members of respondent's reservation realize and accept that they are full-blown Minnesota residents, full-blown U.S. citizens, and are not really a true sovereign nation or country in any real sense of the word. I know they know that, and I know they accept that because they continuously demand and

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[1] It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Path of the Law, 10 Harv. L.R. 457, 469 (1897).

exercise all the rights and privileges of being Minnesotans and Americans. They vote, they run for public office. The Minnesota Legislature's state senator from Senate District 4, is and has been, an enrolled member of the Leech Lake Ojibwe Reservation and a resident thereof for years. He repeatedly has signed affidavits of candidacy for the Minnesota Senate declaring himself to be of age, to be a Minnesota resident, and to be a resident of the senatorial district from which he files. That district includes both the Leech Lake reservation and non-Indian lands. The Minnesota Legislature at all times holds out to all residents in Senate District 4 that they are bona fide citizens of the State of Minnesota. At no time does the Minnesota Legislature advise Minnesotans living in Senate District 4 that part of that district is foreign or sovereign country, nor does the Minnesota Legislature advise residents of Senate District 4 that they may be governed by a foreign national of a sovereign nation.

The senator from the Leech Lake Reservation is a full Minnesotan, and is completely qualified and completely eligible to run for his senate district and all other local and state offices. All other Minnesota Indians in this state enjoy identical qualifications and eligibility to run for public office, from local right on up through the president of the United States.

In addition to being eligible to serve in the Minnesota Senate and the Minnesota House of Representatives, Minnesota Indians are fully eligible and, if qualified, to file for or be appointed to any of Minnesota's constitutional offices, including state and

appellate court judicial positions. Further, they are eligible to run for one of Minnesota's eight seats in the United States House of Representatives, or our two state-wide United States senatorial positions. I can only note that membership in the Minnesota legislature, the Minnesota judiciary, the Minnesota delegation in Congress, the federal bench, the United States Supreme Court, and the office of President of the United States, is not often extended to foreign nationals of true sovereign nations.

Respondent, and its members, routinely exercise their rights of access, as Minnesotans, to Minnesota district courts and Minnesota federal district courts. They take advantage of the option of sending their children to the public schools of Minnesota. They lobby the Minnesota legislature and raise money (legitimately) for PACS to promote their own self-interest, and in all other things enjoy the same rights and privileges open to Minnesota residents and Minnesota businesses, regardless of race or color.

What respondent's attorneys are really after is a race-based economic preference that other races in Minnesota do not have. I do not quarrel with their right to be here on appeal. Ethical attorneys are required to support their client's cause, and when stuck with the facts and stuck with the law, they have no choice but to put their client's best foot forward. Here, that means cloaking their client's request for a race-based economic preference in the historical myth of "Indian sovereignty."

I hope I have been able to set out in this opinion that history, not myself, has marshaled the most compelling argument possible that Indian sovereignty never existed and does not now exist. If the only issue were an argument that perhaps out of all the different races in Minnesota, if any one could justify being singled out for preferential treatment, it would be the American Indian, I would have written a whole different opinion. History would marshal the argument, "Hey, America, its pay back time." But that is not the issue, as it cannot be, as pure race-based distinctions are an area this country has done so poorly in, we put them aside for fear of divisive and hate-filled bias resurgence. The issue is, instead, "can we do what needs to be done for Indian tribes and for individual members, and can we do it legally?" The answer is a simple unqualified "yes."

As I have set out in this dissent, the machinery is in place on the state and federal levels, and has been so for decades, for hundreds of years, to treat all we citizens, all we Americans, subject to the reality of our limited resources, with all the care, respect, and compassion that we can give. Other than that, we cannot do, as no state, no country can give what it does not possess.

If we follow respondent's reasoning, it, as a reservation, is entitled to be a private, sanctified enclave with the extraordinary privilege of not having to answer for its alleged acts of negligence in a Minnesota district court. I am simply not persuaded.

How many private enclaves within this state, within this country, do we want to establish before we realize we are Balkanizing America? At last count there were 500 to 600 federally recognized tribes. That begs the question of why should a white government get to designate who can be a real Indian tribe and who cannot be. Anthropologists, linguists, and serious students of Indian culture conclude there may be as many as 2000 different distinct groups of Indian people, some small and some larger, with a separate and identifiable culture, way of life, or language. The lower number of 500 to 600 is expanding with the push for economic development, with or without gambling, as unrecognized bands or tribes are petitioning the federal government for recognition as yet another "sovereign nation."

Whether we have 500 to 600 (and growing) federally recognized tribes, or 2000 or more (and growing) distinct tribes, we should talk to Yugoslavia about Balkanization. Yugoslavia no longer exists.

This is not a case of finding room for the great waves of European immigrants that this country experienced between roughly 1800 and 1920. Everyone involved in this issue is already here! The one race or tribe or ethnicity that does not immigrate to America, by definition, is the American Indian.

We simply need to provide for these fellow citizens, who have been with us always, and with us a lot longer than we have been with them, and treat and respect them with the laws already on the books for the class of people we call "Minnesota Americans."

Respondent in this case, a defendant in a personal injury case, is a multi-million dollar casino with millions of dollars in revenues and millions of visitors over its short lifetime. Respondent was designed specifically for, and marketed specifically to non-Indian visitors from outside the reservation. That has to be the clearest economically based express waiver of any claim of immunity that I could design, if asked to be the architect of such a waiver.

I respectfully dissent for all of the above reasons, and would remand this case to the appropriate Minnesota district court to continue. It would be Minnesotan against Minnesotan, in a court trained to handle such matters. No harm will be done.

February 7, 1996

Michael Harris, Esq.
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Seat of the Cherokee Nation

Testimony before the Senate Oversight Committee on Indian Affairs, March 11, 1998

Observations on the premise, practice, and product of Tribal Immunity.

One of the first concepts impressed upon a student at law school is that a contract is an agreement which is legally enforceable. *Legally* enforceable. Immunity forecloses legal proceedings to enforce agreements.

Sovereign immunity was articulated as an extension of a doctrine, and was a device employed to legitimize the rule of the British monarchy - *the Divine Hierarchy of Kings.* The argument as advanced held that since the monarch was divinely appointed, he or she was an instrument of God's will, and therefore could do no wrong. Any assertion of error on the part of the monarch was, by definition, wrong-headed and, in practice, frivolous.

The Royal Family no longer enjoys this privilege anymore than the colonies recognize their Divine Right of superintendence over our affairs. But our common law retained this doctrine if for different reasons. To award a judgment against the government by the judiciary was considered a violation of the separation of powers, an exercise of a legislative function in the disbursement of public monies for the benefit of one rather than all.

Ultimately however, this Nation and all states abrogated immunity to some extent when it was acknowledged, all rhetoric aside, that an injustice to one citizen is an injustice to all citizens when practiced by that our government. This principle gain favor everywhere except Tribal governments.

Some people are convinced what Indian Country means can be found in Section 1151 of Title 18. But to know what Indian Country means is to know what sovereign immunity means. The hysteria which surrounds any suggestion of abrogating tribal sovereign immunity always speaks louder than the finest advocate in its favor.

This alarm is not only misplaced, it's actually subversive. It's important to appreciate the distinction between "sovereignty" and "sovereign immunity".Only then is it possible to comprehend the injury sovereign immunity routinely inflicts on tribal members.

It's like watching a drowning man ask for a glass of water. As a federal policy, it is flawed at its inception, unjust in its application and disastrous in operation. Immunity from suit is as important to sovereignty as duct tape is to an good architect.

Tribal sovereign immunity from state jurisdiction began as creature of judicial construction in a series of decisions which span approximately 150 years. *Worchester v. Georgia, The Kansas Indians, Williams v. Lee, and Arizona State Tax Commission*. Absolute immunity from suit was further extended by judicial fiat in the decision, *Santa Clara Pueblo v. Martinez, (1978)* . and defended in *California v. Cabazon Band of Mission Indians(1987),* and subsequent decisions which followed. All these opinions, however well-intentioned were based upon the same questionable presumptions and specious reasoning.

Among the most damaging of these contentions is that sovereign immunity advances the goals of tribal self-sufficiency, and economic development. This opinion reflects the attitude that economic development is some sort of seismic event which issues forth like "Old Faithful" to be enjoyed by the patient and watchful. Yet if all modern economists agree on nothing else, it is the fact that economic development is a product of a proper business climate.

If sovereign immunity were significant to economic development in any meaningful sense, why, historically, do Native Americans rank at the bottom of all economic and social indicators? Why, according to Ada Deere, former Assistant Secretary of Indian Affairs, does unemployment among tribal members continue to average 50%? Why, with the enormous competitive advantage of exemptions from state taxes, federal taxes, and immunity from suit, don't Indian enterprises dominate marketplace?

In truth, tribal immunity deters growth, prosperity, and economic independence.

Non-tribal sources of investment and capital are understandably reluctant to negotiate agreements with Tribes who are immune from suit. Legal uncertainties, high transaction costs, and the considerable threat that any agreement may be rendered unenforceable are an impediment to commercial interaction between Tribes and non-Indians. These obstacles are not as easily dispatched, as some would suggest, by simply including a few boilerplate clauses waiving sovereignty and selecting law and forum.

No agreement can bind a Tribe if the tribal agent is without the authority to contract. And often there is considerable disagreement within the Tribe as to the extent of any individual's or branch of government's ability to contract for the Tribe. It is not at all uncommon to have the judicial branch invalidate a contract signed by the Principal Chief, or Tribal Chairperson, as an unlawful violation the separations of powers: the legislative branch having the exclusive authority to determine the disbursement of tribal funds.

Nor can a contractor be certain that any subsequent enactment of law will not invalidate an agreement. Tribal law may be applied retroactively as well as prospectively in the absence of any law to the contrary. These problems will vary from tribe to tribe as tribal governments are as different in structure as the cultures they represent.

No complement of competent lawyers can guarantee safe passage navigating tribal law quicksand. The Washington D.C. firm, Swidler and Berlin has around 175 associates to its credit, and none of these rescued the law firm from the litigation in which it is now involved in both federal and tribal court with the Cherokee Nation. Another Oklahoma law firm is involved in state district court litigation arising from its contract with the Cherokee Nation.

These results are not necessarily the product of bad faith. But they are the consequence of bad policy. Not only does immunity insulate tribes from liability from non-Indian litigants, it absolves Tribes from accountability to their tribal members.

It grants a license for lawlessness, and is an open invitation for elected Tribal officials to oppress their tribal members. Whatever benefit may be claimed to accrue to the Tribe, the injury sustained by Indian peoples is far worse. In the struggle to preserve immunity, Tribes preclude any realistic hope of overcoming the poverty and despair which afflicts most Indian peoples living in Indian Country.

It is time to re-examine the argument that absolute immunity serves to benefit Indian Tribes, and demand some empirical evidence of its truth. Whatever promise that once lay on that unlit path has fled - if it were ever there. Perhaps it's time, finally, that there be "one law for the native and stranger among us."

Were this true, a tribal member wronged could have access to the same constitutional protections guaranteed to other Americans. He or she might proceed by original petition in a state of federal court to enforce those rights rather by Writ of Habeas Corpus in federal court to address violations of the handful of rights recognized in the Indian Civil Rights Act of 1968 without any meaningful forum. Were this true, a tribal member may be as aware of being an American as he or she is of being Native.

The American Indian Equal Justice Act embodies this principle. It addresses inequities which cannot fail to foster resentment between Indian and non-Indian. It attempts to provide protection, accountability, and opportunity for Indian peoples.

For this, it must be regarded as among the most important effort in the realm of Indian Rights since the Congressional grant of self-determination to Tribes in 1975.This does not threaten two hundred years of Indian law. To the contrary it extends two hundred years basic constitutional jurisprudence. What principled objection can possibly be raised to this legislative endeavor?

That it should have been done sooner?

It is not necessary to deny rights to non-Indians to protect Native Americans. Nor is it necessary to shield Indian peoples from opportunities because although they might do well, they might fail. But what cannot continue is to withhold fundamental constitutional protections from everyone because Tribes don't want to buy insurance.

Stripped of the ornamentation of elevated language, this would be the actual extent of the burden placed on Tribes were the Indian American Equal Justice Act made law . Since most Tribes possess this coverage anyway, it cannot be this intrusion to which the Tribes object. This hearing constitutes the best evidence that with sufficient financing, the most artful speakers can discuss concerns and positions passionately without reference to what is at stake.

It is necessary to acknowledge this problem exists, and it is in the best interests of the federal, state and tribal governments to forge a common solution for its common citizens. All sovereign immunity encourages, if anything, is conduct which is actionable in any other segment of society. What Native Americans really need is a little less immunity, and a little more America.



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March 30, 1998

Sen. Ben Nighthorse Campbell
Committee on Indian Affairs
Washington D.C. 20510-6450

Re: Response to Questions submitted in Correspondence of March 23, 1998.

O'siyo Sen. Campbell:

Thank you for your interest in this matter which is so significant to the welfare of Indian peoples. The following are my efforts to address the supplemental questions presented in your letter of March 23, 1998.

1. Do you believe that contract terms are best left to the contracting parties?

Contract terms should be determined by the parties but contract provisions are never adopted without reference to the current statement of law. This is sole immutable verity of contract. Any discussion of "freedom to contract" which omits the operative reality that "law" is the cornerstone of contract is meaningless.

When asked whether S. 1691 would prevent terms which include resort to tribal courts and law, Mr. Jarboe replied, "No. But it would drastically change the bargaining positions." This amounts to a confession that bargaining positions are *drastically* disparate, and that Tribes must negotiate to arrive at a position that all other parties enjoy when they first sit down to a table with one another.

The statement of federal law, as currently articulated, is that any performance "contracted" from a Tribe is mere "promise" to perform, and any performance tendered to a Tribe is a "gift", in the absence of a waiver of sovereign immunity. Nomenclature aside, this is the effect of a policy which holds that the non-Indian entity is bound but the Indian Tribe is not. This is precisely what occurs, and with such regularity that it has become a topic of frequent discussion among jurists and legislators.

To inquire whether terms are best left to the contracting parties avoids a more troublesome truth. Individuals who are free to contract are free not to contract as well and the latter decision precludes consideration of the incidents of the former. Too often this essential fact is overlooked but its importance cannot be overstated.

2. How has tribal immunity played a part in the contracts you have negotiated with Indian Tribes?

Tribal immunity has presented an impediment to contracts with non-Indian business entities. Mr. Jarboe is correct in his testimony, it is an issue. But he was disingenuous when he stated, "it is *just* an issue". It is an issue that is often dispositive of the inclination to do business with a Tribe.

Part of the difficulty is predicated on the understandable tendency to group all Indian peoples' circumstances together. Hence, a non-Indian business entity desirous to conduct business with and on an Indian reservation will have no choice but to address the issue of sovereign immunity. However, in Oklahoma, where no reservations exist, venture capitalists who are given a choice between financing low cost housing with Indian Tribes or opening up a number of tanning salon franchises will make a decision based on the numbers, and as a rule, it is not to the benefit of Indian peoples.

This decision in no small part is determined by the lack of certainty which characterizes transactions with Indian Tribes. Immunity, applicable law, proper forum, while not insurmountable obstacles, are obstacles nonetheless, and no rational business entity undertakes an endeavor the transaction costs of which are substantially higher than the many available alternatives.

3. Should the Federal Government review privately negotiated contracts for fairness?

This is already the practice for all Tribes who do not operate under a Grant of Self-Determination. The Bureau of Indian Affairs, pursuant to 25 CFR 81 reviews and ratifies all contracts negotiated with Tribes, and without the approval of the BIA, all moneys paid pursuant to a contract are subject to a *Qui Tam* action for recovery.

As for the Tribes granted self-determination, it is not necessary that the Federal Government review contracts for fairness. Indian Tribes are capable of negotiating mutually beneficial contracts. We have lawyers, too. However, the chief concern should be that opportunities to contract not be foreclosed because of a misplaced, overly-protective and archaic concept of who and what Indian people are and what they need.

It seems curiously inconsistent for the Federal Government on one hand to hold that Indian people are capable of governing their own affairs and on the other, shielding them from all the risks and benefits of so doing. If the Federal Government is actually interested in fairness, level the playing field. To do otherwise betrays the fact that the Federal Government does not believe Indian people can look after themselves, an opinion that has many adherents within the Department of the Interior.

When the *same* law operates consistently and fairly for all contracting parties, there will be no need to police individual contracts for fairness. When Indian peoples are sufficiently respected that they are treated as equals rather than "wards", the opportunities that all other citizens take for granted will be available to tribal members.

In closing, I hope I have succeeded in emphasizing that the true difficulties do not arise when a Tribes sits down to contract with a non-Tribal entity. Rather the problem occurs that often Tribes never reach this point because the law, as currently constituted, makes this a poor business practice when other options for investment exist for non-tribal entities. Necessarily, a loss of opportunity is always difficult to measure but it is simple to observe first-hand in Indian Country.

Of course it is fitting that federal agencies whose livelihood is predicated upon the continued vulnerability, poverty, and dependence of Indian people would oppose any effort change this condition. Yet it is only with the greatest restraint that one may listen to a bureaucrat in a blue Christian Dior suit profess with a straight face," Social and economic conditions are so dire for Indian people, and not much improvement has been documented in the past twenty-five years. To change federal policy with regard to the Tribes could only lead to a catastrophe." Since virtually all the Tribes with a grant of self-determination are fully covered with insurance, a reasonable person is compelled to wonder, "a catastrophe for whom?"

Any discussion of the impact of 'sovereign immunity" is generally a dry discourse at best in the hands of academics. But it has peculiar force when its effects are witnessed in the slack faces which populate the multitude of withered Indian communities in this Nation. These towns, these families, these persons have names but the people who champion their plight do not know them.

Your Committee is singularly situated to address a problem which is more immediate than many suspect. Indian peoples are actually oppressed by well-intentioned federal protections. Further, the non-Indian backlash which is building seems particularly ironic given the fact that most tribal members suffer rather than succeed as a result of the "special status" these non-tribal members resent.

No good can come from it. Small truths speak in simple words. Important truths are silent.

Wado,

Michael D. Harris, Esq.

TESTIMONY OF SCOTT KAYLA MORRISON
Choctaw Attorney, Wilburton, Oklahoma
March 11, 1998

How far does tribal sovereignty extend? That is the question of concern. You know about situations where non-Indian patrons of tribal casinos were prevented from bringing suit against a tribe because of tribal sovereign immunity. You may not know about a situation that is more troubling to me, a situation where tribal sovereign immunity extends to suits on behalf of the United States to enforce a contract. When tribes cannot be sued by anyone, even the federal government that funnels billions of dollars into tribal coffers each year, the tail is wagging the dog.

Sovereign immunity against the United States has been used by tribal leaders and tribes in both the criminal and civil areas. The Eighth Circuit is currently considering Darrell "Chip" Wadena's argument that the federal government cannot criminally charge him with federal crimes involving federal money because of sovereign immunity.

The Seventh Circuit (U.S. ex rel Hall v. Tribal Development Corp., No. 96-1772) issued a ruling in 1996 that said that citizens cannot bring a False Claims Act suit on behalf of the United States against a tribal corporation. The court ruled that the tribe was an indispensable party and could not be sued because of tribal sovereign immunity. If the federal government cannot sue tribes to enforce contracts, we have a problem. Most of the billions in federal aid received by tribes are through Public Law 93-638 contracts or Self-Governance Compacts. With no administrative accountability process, as is currently the case, and no enforcement mechanism through the courts, Congress has no control over federal dollars once it goes to tribes. There will be no accountability to anyone unless sovereign immunity is limited in some fashion.

I would like to share my experience of sovereign immunity as it pertains to a federal contract. The woman standing behind me, Rose Burlison, was arrested in 1995 at the Choctaw

Labor Day Festival in Tuskahoma, Oklahoma, for videotaping the arrest of a 64-year old grandmother, Juanita McConnell. Mrs. McConnell was arrested for passing out Choctaws for Democracy pamphlets. Thirty minutes later, Douglas Dry, an attorney, Marine Corps Reserve major and a candidate for chief, was arrested for passing out literature and he "voluntarily" slammed his face into a tribal police car while handcuffed.

At the time the three were arrested, the tribal attorney said that they violated a law that prohibiting passing out political literature on tribal or federal land. When it was discovered that no such law existed, the three were charged with a variety of charges, including disturbing the peace and disrupting a parade. Mrs. Burlison faces almost five years in jail. Mrs. McConnell faces over three years in jail. Major Dry faces almost five years in jail. Free speech can be punished on Choctaw land because of the legal fiction that the U.S. Constitution does not apply to Indian Country.

How could our tribe arrest these Choctaw citizens when we never granted criminal jurisdiction to our tribe under our tribal constitution? The Bureau of Indian Affairs has taken the position that the Choctaw Nation contracted federal criminal jurisdiction through a Public Law 93-638 contract. The mechanism that allowed this is uncertain, and I believe illegal. What is certain is that 1) the U.S. Constitution does not apply to Choctaw land, even though federal criminal jurisdiction is being exercised; and 2) tribal sovereign immunity applies when we sued the tribal officers over the arrests in a civil rights lawsuit in federal court. The tribal officers are represented by the U.S. Attorney's Office in their official capacity but are asserting tribal sovereign immunity in their individual capacity. They are playing both sides of the street.

The three Choctaw citizens arrested have been forced to defend themselves, out of their own pockets, for over two years in a Court of Indian Offenses for the Choctaw Nation, a

supposedly federally administered court. They were charged for violating laws passed by the Choctaw Council, instead of under the Code of Federal Regulations. They have been unable to obtain evidence necessary for an adequate defense from the Bureau of Indian Affairs and the U.S. Attorney's Office due to the regulations of a CFR Court, even though this is a court exercising federal criminal jurisdiction.

The tribal prosecutor is also the tribal attorney who represents the executive and legislative branches of the Choctaw government. This violates the separation of powers doctrine of the U. S. and Choctaw Constitutions. The chief appoints the judge for this court, even though the federal regulations state that the BIA is supposed to appoint the judge. The chief can also fire the judge at will under the Choctaw Constitution. The chief also can fire the tribal police for not doing as he orders. The chief intentionally hires a tribal prosecutor he can control. Prior to hiring the son and law partner of the tribal attorney, the former chief, Hollis Roberts, offered the tribal prosecutor job to Micah Knight, a Choctaw attorney he thought he could control. She turned down the job.

The chief and the council can manipulate the court to their advantage. Our former chief Hollis Roberts was convicted of sexually abusing tribal employees who were tribal members in federal court in June 1997. Prior to the indictment, a victim, whose attorney was Douglas Dry, sued the chief in federal court but the case was dismissed due to sovereign immunity. She was told by the federal court to sue in Choctaw court. Ten days later, the council changed the statute of limitations from three years to six months so the victim could not sue the chief. The speaker of the council said this was the specific reason for the change as shown in the council minutes.

Dry, Burlison and McConnell have filed a writ of habeas corpus I have here in federal court in January 1998. It sets out 17 reasons why they should be released from these charges and

documents the abuses of the Choctaw court. Judge Frank Seay dismissed the writ February 2, 1998, in a one-line order because they were not "in custody." This order has been appealed to the 10th Circuit.

This is a system ripe for abuse because of no accountability -- from the federal government or tribal citizens. Under the current state of the law, we cannot sue our tribal government because of sovereign immunity and the holding of Santa Clara Pueblo. Without federal court jurisdiction, we are at the mercy of a tribal government that has proven itself capable and willing to harass and intimidate tribal citizens. Sovereign immunity was intended to be a shield for tribes to become responsible and financially solvent governments. However, it has become a sword used against tribal citizens.

You will be told that more money to tribes will solve any problem discussed here today. Let's look at how money has created, not solved, problems in the Choctaw Nation. From 1991 to 1995, the tribe received over $1 million dollars to prosecute only three people for free speech. Since these arrests in 1995, the tribe has received a second $1 million and it has prosecuted a total of 15 people in 5 years, with a tribal population is 107,000, with 25,000 living within our boundaries. Of those 15, six were Choctaws for Democracy members. These six were charged with 22 crimes while the nine non-CFD members were charged with only 10 crimes, mainly public intoxication. It appears from the figures that the tribal leaders are targeting a certain group for harassment and intimidation, using federal funds and federal criminal jurisdiction to accomplish this.

At the 1996 Labor Day Festival, there were more arrests for possessing Choctaws for Democracy pamphlets. The Choctaw Nation hired off-duty police officers from state law enforcement agencies as security during the Festival. Non-Indian officers wearing City of Durant

police uniforms and badges assaulted Douglas Dry for possessing literature. Durant is 100 miles from the place of the arrests in Tuskahoma. We sued the officers in federal court. The Choctaw tribal attorney represents these officers and asserted tribal sovereign immunity on their behalf. His argument is that since they are tribal officers, we can't sue in federal court; since they are non-Indians we can't sue in Choctaw court; and since it happened on tribal land, we can't sue in state court. According to his argument, non-Indians can be hired by the tribe to assault tribal citizens without recourse. Without federal court review, we are at the mercy of a tribal government out of control.

We hear "vote the bums out" as a solution, instead of limiting sovereign immunity. We cannot do this because the war chest to re-elect our chief and council comes from federal funds. This is how it works: The tribe is given federal funds under PL-93-638 to maintain the Choctaw voter registration list. This list is only available to administration and candidates of its choice, not to all candidates. The reason for such secrecy is the federal Privacy Act, according to the tribal attorney. The Office of the Solicitor and a federal court have both ruled that the Privacy Act does not apply to the Choctaw voter registration list. But the tribal attorney continues to assert the Privacy Act prevents release of the list. The tribal attorney is paid by federal funds for this advice that is clearly against the law. But when tribal candidates can't sue the tribe in federal court because of sovereign immunity and can't win if they sue the tribe in tribal court, the tribal attorney can give any advice the administration wants to hear.

In 1987, a candidate challenged withholding the voter registration list in federal court. The district court ruled that the BIA must release the list. However, ten days after the filing of the complaint and prior to enforcement of this ruling, the BIA amended the voter registration contract with the tribe to only include names but no addresses. With a tribal population of

107,000 scattered across the country, candidates cannot inform the membership of their platform without addresses. The BIA continues to funnel federal funds into a tribe that diligently denies us basic input into our own tribal affairs: election of tribal leaders. This is not self-determination, this is a dictatorship.

In addition to withholding the voter registration list, the Choctaw Nation does not allow candidates a platform in the tribal newsletter, the Bishinik, which is funded by federal funds, by the way. According to the Bishinik, the only candidate is the incumbent, and there is no free exchange of ideas in the paper. Federal funds are used to violate candidates and tribal members free speech and free association. This can be done because there is no mechanism to allow accountability. We can't sue and you, the federal government, can't sue.

Another way the administration controls the election is mailing campaign literature of the incumbent, using federal funds. The chief sends out campaign letters, birthday and Christmas cards, using the tribal postage meter and the voter registration list, both funded by federal funds. But the abuse of federal funds in campaigning does not stop there. Federal funds are used to send out campaign letters for the state governor, a U.S. Senator, state representatives, state judges, county commissioners, and county sheriffs. Rep. Wes Watkins can provide first-hand experience with use of federal funds in campaigns. With political favors owed the tribe, tribal members are further at the mercy of tribal leadership in forums outside of tribal government. And federal funds allow the consolidation of such political power.

The tribe controls the press in southeast Oklahoma, directly or indirectly. The former chief Hollis Roberts and the tribal attorney own newspapers outright; the tribe owns shares in newspapers; and the tribe has contracts with newspapers for tribal printing. Small newspapers have a vested interest in not printing fair and accurate tribal news. Tribal citizens cannot

participate in tribal affairs if they are uninformed, and the tribal administration can maintain ignorance with federal funds at their fingertips.

Tribal members cannot "vote the bums out" in such a system. There is no mechanism to bring justice and democracy into our tribal government as long as this allowed. We are asking for relief from this tyranny. We want federal court jurisdiction or review. Without it, we will continue to be treated as second class citizens, not federal citizens.

We are not whiners. We have actively sought redress in tribal court, in CFR courts, in state courts, in federal court and now in the 10th Circuit. I have a list summarizing 9 cases we have filed, in addition to administrative complaints within the BIA and letters to Congress. We have nowhere else to go. We are smart, intelligent people who participate in tribal affairs to return a government of the people, by the people, and for the people. This is not an unreasonable request. Congress set up the system we currently live under. Congress can change it. We want to get back to our lives instead of investing thousands of dollars in fighting a corrupt system funded by federal funds.

(End of oral testimony)

The Choctaw Nation is a microcosm of what is going on across Indian Country. The lack of accountability creates an atmosphere ripe for corruption and abuse. The Mississippi Choctaw Tribal Court has problems similar to ours.

Chokwe Lumumba, an African American attorney in Mississippi, represents a Mississippi Choctaw in an action in tribal court to stop the casino, Silver Star. During a court hearing, Mr. Lumumba was fined $300 for contempt of court. His contempt was 1) folding his arms; 2) saying "uh-huh"; and 3) for an undisclosed incident that happened in chambers. He has not paid this unfair fine and has been told that he would be arrested if he came on the reservation again. The

problem is that a tribe does not have criminal jurisdiction over non-Indians and cannot arrest him Regardless, due to this threat, the tribal member has been denied an attorney of choice to represent him in tribal court.

Another tribal member, Harrison Ben, is a councilman on the Mississippi Choctaw tribal council. He was arrested in January 1996 for violating a law outlawing possession of tribal documents without permission of Chief Philip Martin. I was contacted by tribal members when this law was passed and asked for a copy of it from another councilman. He said that he could not get a copy of the ordinance because possessing it would be illegal. There is a serious problem with notice to tribal members of what action will result in criminal prosecution by withholding this ordinance from the tribal public.

This ordinance is not available through the Bureau of Indian Affairs either. Under 25 CFR Part 11.100(e), the BIA must approve it before it becomes effective law. BIA employees are concerned that release of this ordinance will result in their arrest. There are several problems with this. First, the tribal or CFR court does not have jurisdiction over federal employees. Second, withholding this information violates due process of tribal citizens under the U.S. Constitution or the Indian Civil Rights Act. Third, this determination violates the Freedom of Information Act which would allow release of this ordinance. Fourth, even if the tribe had authority over federal employees, the BIA headquarters is off-reservation and the tribe does not have extra-territorial criminal jurisdiction. The tail is wagging the dog when this can happen.

At the January 1996 council meeting, Harrison Ben was asked to approve the casino budget without an opportunity to study it or talk to his constituents. He refused to vote on it and left the council hall with the budget in his possession. He was arrested the next day. Mr. Ben's

attorney, Harvey Freelon, is an associate of Mr. Lumumba since Mr. Lumumba cannot return to tribal court. Mr. Freelon filed a motion to dismiss that was denied on April 25, 1996. The decision was published in 23 Indian Law Reporter 6119 (July 1996). Mr. Ben filed an appeal within 30 days of the decision and to date, this appeal is still pending. Mr. Ben is still facing a criminal charge over a year later.

I worked on the Miss. Choctaw reservation as staff attorney for East Mississippi Legal Services in 1990-91. I had many problems litigating in tribal court. I had a bad feeling about going to my regular civil docket on December 6, 1991. When I did not show up, the court clerk (a non-Indian) asked the county sheriff to go by my apartment off-reservation to bring me to court. She sent the Choctaw police to pick up my friends and staff on the reservation to question as to my whereabouts. The Mississippi Narcotics Bureau was sent to find me at friends in Jackson, Miss., and broadcast my tag and a description of my truck. All of this was done without a warrant to bring me back to tribal court. I have documentation of this because the tribe filed a bar complaint against me. During the bar complaint hearing, I was provided documentation and two days of testimony. It was pretty scary. Now, they refused to even acknowledge my application to practice in Miss. Choctaw tribal court.

ORIGINAL

TESTIMONY OF CHIEF PHILLIP MARTIN
CHIEF OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
March 11, 1998

Mr. Chairman and Members of the Committee, my name is Phillip Martin. I am the Chief of the Mississippi Band of Choctaw Indians ("Choctaws" or the "Tribe"), a tribe of 8,300 members with a small reservation of 24,000 scattered acres in East Central Mississippi. The Choctaw are a people who have maintained their culture and language, which is still spoken by the majority of the Tribe, and the Choctaw reservation is governed by a democratically elected 16 member Tribal Council, all of whom are elected for staggered four year terms. The Chief is also elected at large for a 4 year term.

I thank you for your gracious invitation to address the important issue of tribal sovereign immunity as it relates to economic development, commercial dealings and taxation, especially against the backdrop of the recently introduced legislation that seeks to take away a tribe's right to assert or limit its immunity from suit. Put simply, immunity from suit is a fundamental and critically necessary element of sovereignty and has been essential to the Choctaw's efforts to attain economic achievement and a level of tribal self-sufficiency.

The Choctaws realized decades ago that the key to improving the social and economic well being of our people lay primarily in our own hands rather than in the hands of the State of Mississippi or the Federal government. At the same time, the Tribe was painfully aware that we had no industry or infrastructure and suffered from an unemployment rate of more than 75 percent.

Moreover, the Tribe had essentially no natural resources that could be used to generate income or wealth, and our tribal membership lacked education, had no practical work experience and suffered from overwhelming health problems.

In the 1970's, the Tribe focused on equipping its tribal members with the skills and confidence they needed to be productive members of the work force. Working towards this end, the Tribe committed its limited tribal and federal resources to strengthen its local schools, run adult education and vocational programs, provide assistance and encouragement to students to pursue higher education and educate tribal members about how to live healthier life-styles.

In tandem with that effort, the Choctaws focused on building their own industrial and commercial base to create entry level jobs for the Choctaw people and our non-Indian neighbors. Critical to the development of our commercial enterprises was our ability to exercise our sovereign immunity and to negotiate contracts with our business partners using appropriate waivers of this immunity.

From the very beginning, with our first plant in 1979, the Tribe recognized that to succeed in the commercial world we had to operate within certain basic guidelines. We had to be able to convince potential non-Indian partners and investors that if they did business with the Choctaws they first, were likely to make money and second, had necessary assurances that the Tribe was going to honor the contractual obligations of our commitments. The Tribe's adherence to sound business principles and the establishment of a reputation in the business community as a partner that could be trusted has resulted in substantial gains for the Choctaw reservation.

Over the last 20 years, the Tribe has undergone an extraordinary transformation. Once a community stuck in dire poverty, the Choctaws are now the largest employer in Neshoba County and are among the ten largest employers in the State of Mississippi. The Choctaws have experienced this phenomenal growth through self-governance. The Tribe did not receive any money from the state.

Today, the Tribe runs a construction firm, shopping center, printing plant, auto parts manufacturing plant, hotel, casino and championship golf course. Revenues generated from these enterprises are used to provide traditional government services to the Tribe which include law enforcement and courts, fire protection, education, water and sewer utilities, housing, roads, health care, social and related human resources, and economic development. The Tribe operates its own courts, fire department, police force, reservation school system, housing authority, utility commission. and a comprehensive, integrated health care system which includes an accredited hospital, field clinics, a 120-bed nursing home and a kidney dialysis center. In addition, unemployment among tribal members has fallen almost twenty fold to 4 percent and dependence on transfer payments such as general welfare assistance from the federal government has dropped dramatically. Overall, the Tribe's quality of life has sharply improved.

Despite the gains we have made, there is still a role for the federal government, under its trust responsibilities to the tribes, to assist the Choctaws with the unmet needs on the reservation. There remains a huge unmet need for improving health care, education, housing and infrastructure in our community.

The success the Tribe has achieved would have never been possible without tribal sovereign immunity. Tribal immunity from suit has played an essential role in the preservation of our autonomous political existence and has safeguarded our tribal assets. It has also allowed us to develop institutions of self-government, realize self-sufficiency and participate in mainstream society.

Just as important as our ability to assert immunity from suit has been our right to negotiate waivers of immunity with lenders, contractors and other non-Indian business entities. Like all sovereigns – ranging from the United States of America to the City of Philadelphia, MS – we have had to necessarily waive our sovereign immunity to induce third parties to enter into contracts with us. The Choctaws believe that this basic free enterprise or freedom of contract approach to addressing the tribal immunity issue is both the most economically efficient and the best way to protect our people. A private party negotiating a contract with a sovereign tribe is in the best position to determine what terms of a deal are and are not acceptable, just as they are in negotiating a contract with anyone else. In addition, this approach has provided us the leeway to privatize almost all government services by contracting to provide such services directly ourselves. From our experience and standpoint, this contract approach is the most effective way for a tribe to negotiate with non-Indians and has worked very well for us.

We have followed this approach and have honored our contracts because it was and remains the right thing to do and in our best interests to do so. The only way the Tribe was able to attract capital to the reservation to build any significant commercial base and generate revenues needed

to support and improve our communities was to voluntarily waive our immunity. Parties interested in conducting business with the Choctaws would not have entered into these agreements had there been no legal ability to seek redress for grievances. It is also important to recognize that our partners also voluntarily entered into contracts with us as well. No person or business is obligated or forced to contract with an Indian tribe.

Once we established an excellent track record with our lenders and first business partners, financing for other enterprises and manufacturing plants followed. Had we not lived up to our end of the deals and hid behind sovereign immunity had our partners come to seek redress, however, we would have destroyed our standing with the outside business community and could have never obtained the financing we needed to build and develop our commercial enterprises.

It is the market that has and will continue to regulate business cases involving sovereign Indian tribes and non-Indians. When we first embarked on our strategy to look for outside private investment, we were aware that outsiders would not do business with tribes if it was not in their own economic self-interest to do so. I am personally cognizant of the difficulties a tribe must go through to get the attention of and convince non-Indian businesses to invest in tribal enterprises. Outside contractors and investors already possess the economic resources and capital necessary operate on an equal basis in business dealings with the tribes. A tribe that asserts tribal sovereign immunity in a contractual setting will soon find itself without any business or contracting partners and will be unable to attract capital from lenders and investors. It is for this reason that Federal legislation to revoke sovereign immunity for the tribes is unnecessary and an unwarranted attack on our sovereignty.

I also want to emphasize that ultimately it is not questions of legal defenses or legal rights and legal immunities and jurisdiction that determine whether or not a long term commercial relationship can be established and maintained between a tribe and an outside investor. The most important aspect of maintaining such a relationship is trust.

Under existing law, there is no ability for a Federal court or a Mississippi State court to decide commercial disputes arising on our reservation – even if the parties wanted to use one of these forums. On the Choctaw reservation, the only forum available to resolve such disputes has been the Choctaw Tribal Courts. In recognition of that, the Choctaw tribe has a written code of laws and civil procedures. Furthermore, we employ experienced, licensed attorneys to sit as judges over civil and commercial disputes. Our experience indicates that our tribal court is scrupulously fair to the interests of non-Indians and nonmembers, and the judges are equally even-handed in their decision-making processes when compared to federal and state courts. I am certain our business partners would agree that our system operates in such a fair and honest manner. In fact, even though we have this system, the Tribe has never had a conflict with a business partner requiring resolution by the tribal courts.

For the reasons stated above, the Choctaws believe that sovereign immunity for tribes should remain and that legislation seeking a sweeping waiver of tribal sovereign immunity is unnecessary and will undermine tribal self-government and self-sufficiency. Furthermore, assertions that the federal, state and local governments have either abolished or severely

restricted the doctrine of sovereign immunity are grossly exaggerated. The tribes are utilizing the doctrine as it was intended and in the same manner as federal, state and local governments.

You have also asked that I briefly comment upon the relationship of the Choctaws and the State of Mississippi in regard to the issue of taxation in general and the question of taxation of on-reservation activities in particular. To put my comments in context, it is important to realize that the Choctaw reservation has different origins and legal characteristics from many of the Western reservations. Unlike most of the tribes in the West, the Choctaw reservation does not have a treaty based, executive based or statutorily based exterior boundary within which there exists tribal lands or in which there exists tribal lands and non-Indian or Indian owned fee lands or trust allotments. Our entire reservation consists of trust land parcels, the title boundaries of which in effect make up our exterior reservation boundaries. Thus, our experience has not required us or the state to wrestle with the jurisdictional situations addressed, for instance, by the U.S. Supreme Court's decision in Montana v. United States, 450 U.S. 544 (1981), where the Court laid down some basic rules addressing the scope of tribal jurisdiction over non-Indians for their activities on fee lands within the reservation boundaries, and in later cases which recognized some greater degree of state jurisdiction to regulate the activities of non-Indians on such fee lands.

The Tribe does not have any fee lands within its reservation boundaries, so all of the tax issues regarding the reservation have involved questions of whether the state or the Tribe had the ability to tax land, property or transactions which occur on trust land parcels. In this regard, we and the State of Mississippi wasted too much time and energy fighting about jurisdiction and taxes in the early 1970's. The hostility and legal battles largely ended when the U.S. Supreme Court entered

its decision in United States v. John, 437 U.S. 634 (1978), reaffirming the legal status of our tribe as federally recognized and the legal status of our land as Indian reservation land outside the state's jurisdiction.

Since then, the Tribe and the state have worked closely to address these tax issues. As part of the Tribe's commitment to work cooperatively with the state and local governments, the Choctaws have not pushed issues of tax immunity to the limits that are permitted under existing federal law. At the same time, the State of Mississippi has also shown its commitment to work cooperatively with the Choctaws on tax issues and has made some accommodations to the Tribe in terms of tax breaks which the state is not required to make and not collecting certain taxes which it could under federal law. The state also exempts all transactions on the reservation lands from state sales or gross receipt taxes. While these arrangements do not involve very much money, they are important concrete examples of how a state (as well as the local governments surrounding a reservation area) and a tribe can work in concert to resolve jurisdictional tax issues. The point here is that this is all a two way street.

We also have an excellent working relationship with the State Tax Commission. There always has been and will continue to be an ongoing dialogue on many fronts involving contractor's taxes and ad valorem taxes to name a few. We intend to keep working together cooperatively to provide for effective collection mechanisms when taxes are due and to sit down at the table and work out mutually agreeable solutions.

Our ability to operate on our reservation lands free of most state taxes and regulations has allowed us to grow our businesses through an approach very similar to a free enterprise zone. By working honestly and reasonably with the state and the surrounding communities, we have also been able to establish a relationship that is mutually beneficial for all parties.

I would also like to point out that our tribe and the State of Mississippi have just recently executed an accord which solidifies the positive working relationship we have jointly developed. A copy of the accord, which is attached to my written testimony, in essence commits both the state and the Tribe to a formal process for working out jurisdictional and tax type issues at a high level. Both parties agree that this accord provides for a forum to negotiate our differences before they get blown out of proportion or place the tribe and the state in a position of confrontation that neither of us wants.

The approaches I have outlined today have been good for our Tribe, good for the State of Mississippi and good for our business associates. We have gone from an impoverished community to a positive economic and social force in Mississippi.

In closing I want to say that I realize that our history and our relations with the state in which we are located is different from other tribes throughout this great country. In some ways, we have experienced more historical tragedy than many of the other tribes have had to endure and in some ways less. The Choctaws have chosen, however, to focus on the future – on what we as a people can contribute in positive way to build effective and profitable commercial relationships and government-to-government relationships with the State of Mississippi and its political

subdivisions. We are committed to this course. It has worked, and in regard to pending legislation which has been offered to fundamentally change the state/tribal jurisdictional allocations and the sovereign immunity doctrine, the Choctaws believe that the consequences of this legislation would be far reaching and detrimental to the tribes and would severely damage a tribal government's ability to manage its own affairs.

Mr. Chairman and Members of the Committee, I appreciate your long-standing support of Indian tribal governments and your continued support of tribal self-determination and the protection of our sovereignty.

Accord Between the Executive Branches of the Mississippi Band of Choctaw Indians and The State of Mississippi

WHEREAS, the Mississippi Band of Choctaw Indians is a federally-recognized Indian tribe retaining its rights of sovereignty as recognized by treaty, federal and state law, and federal and state court decisions; and

WHEREAS, the territory of the Mississippi Band of Choctaw Indians is located in Mississippi, and citizens of the Mississippi Band of Choctaw Indians residing in Choctaw Indian Country located in Mississippi are also citizens of the State of Mississippi; and

WHEREAS, there exists an interdependent relationship between the government of the Mississippi Band of Choctaw Indians and the government of the State of Mississippi; and

WHEREAS, the executive branch of the Mississippi Band of Choctaw Indians and the executive branch of the government of the State of Mississippi, on a regular basis, work and cooperate with each other on numerous and varied governmental programs; and

WHEREAS, in working with each other, it is proper, necessary, and beneficial that the executive branches of the Mississippi Band of Choctaw Indians and the State of Mississippi act in a manner that will continue to build upon and improve the delivery of governmental services and in a manner that is cognizant of, respectful of and consistent with the sovereignty of the Mississippi Band of Choctaw Indians and the sovereignty of the State of Mississippi, be it therefore

RESOLVED AND AGREED that the executive branch of the Mississippi Band of Choctaw Indians and the executive branch of the State of Mississippi will, in the future, at all times, work with each other on a government-to-government basis, and in furtherance of this relationship, will develop memorandums of understanding between the executive departments of the Mississippi Band of Choctaw Indians and the executive departments of the State of Mississippi setting forth the procedures and guidelines to ensure that programs affecting both entities are effectively implemented while the sovereignty of both entities is properly respected; and be it

FURTHER RESOLVED AND AGREED that the parties hereto have entered into this Accord for the sole purpose of enhancing government-to-government cooperation between the executive branch of the Mississippi Band of Choctaw Indians and the executive branch of the State of Mississippi. This Accord does not, and shall not be construed to, change, enlarge, diminish, or waive the sovereignty or jurisdiction of either party, or the rights, privileges, or immunities of any person. In addition, this Accord does not, and shall not be construed to, create any right to administrative or judicial review, or any other right, benefit or responsibility, substantive or procedural, enforceable by any person against the executive branch of the Mississippi Band of Choctaw Indians, the executive branch of the State of Mississippi, their officers or employees, or any other person.

Executed on this the 24th day of November 1997

Phillip Martin
PHILLIP MARTIN

Kirk Fordice
KIRK FORDICE

MISSISSIPPI BAND OF CHOCTAW INDIANS

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May 1, 1998

Senator Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-8450

Re: Tribal Economic Development, Sovereign Immunity and Jurisdictional Issues

Dear Chairman Campbell:

I appreciate the opportunity to appear before your Committee at the hearings of March 11 and April 9 regarding tribal economic development and the related issues of tribal sovereign immunity and jurisdiction. In this regard, you have requested by letter of March 23, 1998 that the Mississippi Band of Choctaw Indians provide supplemental responses to four additional questions. I understand that the Committee's questions and our Tribe's responses will be included in the March 11 hearing record.

Taking those questions one at a time, our response is as follows:

Q. The "Kiowa case" was recently argued before the U.S. Supreme Court. The contract in issue stated that the tribe's immunity "shall not be lessened or impaired." Should the court give effect to that provision?

A. This question assumes that the contract between the Kiowa tribe and the third party with whom the Kiowas had entered the transaction in dispute contained language which stated that "the tribe's immunity 'shall not be lessened or impaired.'" The exact language in the contract was as follows: "Nothing in this note subjects (sic) or limits the sovereign rights of the Kiowa Tribe of Oklahoma." See, Joint Appendix, page JA-14, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., No. 96-1037.

The Kiowa Tribe did, however, argue in the case that pursuant to the quoted contract provision, "as part of the transaction, Kiowa refused to give its consent to suit or to waive tribal

sovereign immunity." Brief for Petitioner, pages 6-7, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., No. 96-1037. Thus, the Kiowa Tribe's interpretation of the quoted contract language is consistent with the way that language has been paraphrased in the Committee's question and we will assume the correctness of that paraphrase in our response.

The question you have posed is whether the court should give effect to this provision. Our answer is "of course." This is a matter of enforcing a contract made between the parties. The contract implicitly addressed, but clearly did not waive, the tribe's sovereign immunity from unconsented civil lawsuits. It is well settled that waivers of tribal sovereign immunity cannot be implied, but must be "unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-61, 98 S.Ct. 1670 (1978). The deal the parties made left the tribal immunity defense in force, thus the tribe's subsequent decision to invoke that defense should not have come as a surprise to the plaintiff when the deal went sour. In this regard, we would also like to point out that the deal went sour because of fundamental misrepresentations made by the non-Indian parties to induce the tribe to invest in stock which turned out to be worthless.

Under the basic law governing contracts, courts are expected to enforce the plain terms of an agreement. In this case, certainly the other parties would be arguing that the plain terms of the agreement should be enforced if the agreement had expressly provided for a waiver of immunity and the tribe had nonetheless argued that its immunity barred a lawsuit to enforce the contract. The tribe would and should lose such an argument in such circumstances, just as the plaintiff should, under current law, lose the argument that the contract provision which did not waive immunity should be ignored or disregarded. We in fact argued this point in an amicus brief filed with the court in the Kiowa case.

One argument we responded to in our amicus brief was the suggestion that if sovereign immunity were upheld, "the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business." 921 P.2d at 362.

In response, we pointed out:

* *Amicus curiae* have experienced no such chilling effect. In an analogous setting, the Tenth Circuit has exposed this rationalization ...for what it is:

> The Bank next argues that commercial relations between Indian tribes and non-Indian banks will be chilled if the district court's dismissal (for failure to exhaust tribal remedies) is affirmed. This policy argument precisely misses the point of sovereign immunity, which is the power of self-determination. We decline the Bank's invitation to second-guess the wisdom of the nation's business decisions under the guise of judicial review.

Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992); see also Hanson, 47 F.3d at 1064. Oklahoma's policy consideration is, at best, misguided paternalism. See Presidential Comm'n on Indian Reservation Economies, *Report and Recommendations to the President of the United States*, Part 2 at 31, 115, 121 (1984) (from a 'private sector business perspective' sovereign immunity is considered a 'problem which the teams discovered low on the list of priorities....As noted above, the teams found the lack of good business plans, a shortage of entrepreneurs, and insufficient attention to cash flows to be of far more importance to banks and other investors than questions of collateral.'). Indeed, as this Court has noted, 'the perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances....' Three Affiliated Tribes, 476 U.S. at 893. Tribes and persons dealing with them have long been able to effect a valid waiver of tribal sovereign immunity when they so desire. See, e.g., McClendon v. United States, 885 F.2d 627, 631-32 (9th cir. 1989); American Indian Agric. Credit Consortium, Inc., 780 F.2d at 1378-79.

Brief of the Navajo Nation...and the Mississippi Band of Choctaw Indians as amici curiae in support of the petitioner, pages 17-18, Kiowa Tribe, supra.

We stand by this position. Tribes and their business partners should be left alone to negotiate what degree or extent of sovereign immunity waivers (if any) they can mutually agree upon. Such agreements may limit the extent of the waiver to particular contracts, to particular income streams, to particular assets, etc., and the courts should enforce contracts so negotiated in accordance with their terms. Honoring the doctrine of freedom of contract is a far better way to build reservation economies and protect the political integrity of Indian tribes than imposing a unilateral, federally imposed, "one size fits all tribes and all transactions" change in the law of sovereign immunity.

Q. What is the appropriate "exercise" of tribal immunity in contracts?

A. The issue posed in this question really boils down to one of the prudential exercise of tribal governmental authority in its business relationships. The word "appropriate" thus captures not only the issue of what is legally permitted, but also what is prudent to do in a given circumstance. As I have previously indicated several times in testimony before your Committee, our tribe has historically followed a strategy of not invoking sovereign immunity in the context of commercial or business relationships where to do so would prevent an effective remedy for the other party.

We can, however, envision raising this defense in some circumstances where we have contracted with other parties, e.g., as our agents, who could be sued and provide an effective remedy for a plaintiff. We have to keep in mind that tribes are both business partners and governmental entities. As an operating government, we cannot afford to have our tribal officials tied up in court in routine commercial cases. When we are involved in such court proceedings, we cannot do the other work of governing the tribe or meeting our other business obligations. There are only so many hours in a day. It would also be fundamentally incompatible with basic notions of tribal sovereignty to have tribal leaders routinely hauled into state courts!

This is not to say, however, that any tribe would or should routinely invoke sovereign immunity to bar it from being sued. Again, the issue for us is whether an effective remedy is otherwise provided through a suit against other parties. The ultimate question about what is the appropriate exercise of tribal immunity in contracts is, however, something that will have to be answered by each tribe depending on its circumstances on a case-by-case basis. If a tribe is given a choice of invoking immunity or in effect being bankrupted in

a lawsuit, its duty to its tribal members to maintain the existence of the tribe as a viable governmental entity may require invoking sovereign immunity as a bar to the lawsuit. We have no doubt that the federal government and the states would make this same choice if forced to do so.

On the other hand, tribes will soon learn that they cannot do business on a regular basis with lenders or vendors or merchants or investors if they routinely invoke immunity to avoid ordinary commercial obligations. This is all about balance and business judgment and the prudent exercise of governmental authority.

In this regard, I would point out that the federal government often tries (and sometimes succeeds) in avoiding its contracts through various machinations including the invocation of Congressionally mandated appropriations restrictions and other defenses that are to some extent analogous to, but are different than, the defense of sovereign immunity. See, e.g., the federal government's attempts to use the governmental defenses based on the "delegation" doctrine, the "unmistakability" doctrine, the "reserved powers" doctrine, the "sovereign acts" doctrine, and the "impossibility" doctrine as discussed in United States v. Winstar Corporation, 116 S.Ct. 2432 (1996).

While those governmental defenses did not shield the United States from contract liability in Winstar, they remain viable government defenses routinely raised by the United States to avoid contract obligations which prevent any effective remedy. State governments often do the same. While there are some Constitutional limitations on the ability of the state or federal legislatures or their executive branches to avoid contracts, circumstances do exist that permit that outcome as a matter of law. It is not just tribal governments that may from time to time find themselves in need to invoke sovereign immunity or other special governmental contract defenses that have nothing to do with the merits of the plaintiff's claim.

Q. Would the waiver of immunity in S. 1691 regarding contracts help or hinder your tribe's ability to create jobs and wealth in Mississippi?

A. Based on our experience, the answer to this question is clear. Waiver of tribal sovereign immunity, coupled with the conferring of jurisdiction on state courts to hear disputes arising on our reservation as contemplated in S. 1691, thereby reversing the jurisdictional rule of Williams v. Lee, 350 U.S. 217 (1959), would definitely hinder our tribe's ability to

create jobs and wealth in Mississippi. Why is this? Our tribe's ability to generate businesses and to grow those businesses has dramatically benefitted by being able to operate outside of ordinary state regulatory and judicial jurisdiction. We have been able to deal more flexibly with our business partners and investors, we have been able to create our own regulatory schemes that are locally administered and fit our local situation. Instead, we operate under a fairly limited federal and tribal regulatory scheme. Imposing State regulatory or judicial authority as an overlay to this issue would be confusing, costly and counterproductive.

Also, while the present condition of the government-to-government relations of our tribe and the State of Mississippi is good, there is a long history of hostility between the tribe and the state that we have only recently overcome. As political leadership in the state and the tribe change in the future, no one can predict if we will be successful in maintaining the present state of good relations and mutual respect. The present leadership of both the state and the tribe is committed to that course, but neither party has control of the future. We need only look back at the disastrous consequences for our tribe of a renewal of those hostilities, but this time occurring in a context after passage of S. 1691 or something like it to understand why we oppose any move to subject events and transactions on our reservation to ordinary state court jurisdiction. See, United States v. John, 437 U.S. 634 (1978), where the court reversed prior holdings in state initiated litigation in both the state courts and the federal courts which had previously ruled that neither our tribe nor our reservation legally existed.

It was only after many years of litigation that we were able to secure the ruling in United States v. John, supra, re-recognizing the status of our tribe and our reservation and upholding our tribal jurisdiction and our freedom to operate within our territory free of state jurisdiction. Not coincidentally, it was only after the successful conclusion of that litigation and the holding in United States v. John, supra, that Choctaw's economic miracle was able to get off the ground. We do not want to face circumstances where those battles could be re-fought, but this time in an even more unbalanced legal and jurisdictional context. We do not want to spend a lot of time and money dealing with state regulatory authorities or in state courts in front of judges who may know little or nothing about our situation, and who routinely give no weight to fundamental federal Indian law policies, including the federal trust responsibility to Indian tribes or who will seek to evade federal laws intended to enhance and

protect tribal status, e.g, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597 (1989).

The package of immunities, and the jurisdictional background that underlies our commercial relations are matters that are subject to some negotiation. If the Congress were to pass S. 1691 in its present form, this whole issue would be taken out of the negotiations and the other parties would be given a total victory in regard to jurisdiction and immunity for nothing. Thus, we would be severely hampered in our negotiations and in our ability to strike good business deals at Choctaw if the changes proposed in S. 1691 become law.

Q. What are the remedies available to your contractors if the deal falls apart?

A. The answer to this question depends upon where the contract is formed, where the contract is to be performed, and where the cause of action arose in connection with which a remedy is being sought and which remedies are legally available. Since I have addressed the sovereign immunity defense in response to the Committee's prior questions, I will assume in response to this question that the tribe's sovereign immunity defense has not been raised in the context of the hypothetical question the Committee has posed.

If the contract in question arose off the reservation and was to be performed off the reservation, the ordinary court remedies would be available, e.g., a state court forum and in some circumstances a federal court forum where diversity or federal question jurisdiction was available to hear these disputes. The tribal court forum would also be available for that purpose where the tribe or a tribal authority was a party defendant.

But the bulk of our commercial relations involve contracts which are to be performed on the reservation and where breaches a tribal enterprise would occur on the reservation. Under current law, the only place where such suits can be brought is the tribal court. See, Williams v. Lee, supra and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 104 S.Ct. 2267 (1984) (Wold I) and 476 U.S. 877, 106 S.Ct. 2305 (1986) (Wold II). There are circumstances were diversity or federal question jurisdiction might be invoked to hear these cases in federal court, but the federal court would usually be required to send such cases back to the tribal court under the exhaustion rules of National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 105 S.Ct. 2447 (1985); and, Iowa Mutual Insurance Co. v. LaPlante, 480 U .S. 9, 107 S.Ct. 971 (1987). Thus, again, as

a practical matter, the primary remedy is the Choctaw Tribal Court system.

In this regard, our courts have been fully functional since the late 1970s. We have a very detailed written tribal code with written rules of evidence, written rules of civil procedure and a legally trained judge (a member of the Mississippi bar) who sits on all commercial civil disputes. The particular judge we have now happens to be a non-Indian, although this may change in the future. He is a non-Indian who also lives off the reservation and operates as a contract judge for the tribe.

There is an appeals court in place. Non-Indian plaintiffs have been using this court system for almost 20 years and routinely come in and win cases against tribal defendants. Except in circumstances where the parties have agreed to use arbitration to resolve their disputes, the tribal court provides the primary and sometimes the only judicial remedy for the outside parties.

Keep in mind, however, that a contract is only a part of what builds a commercial relationship. It is the piece of paper setting out the parties' agreement. We have tried to deal with people in an honest and direct manner outside the confines of the piece of paper. We have had almost no litigation involving our commercial business ventures over the last 20 years because we try very hard to work things out. We realize that in most cases litigation should be a last resort and that contract relationships are about more than just the piece of paper. So when you ask the question "what remedies are available," our answer has to include the notion that judicial remedies are and should be the last resort when you are trying to forge lasting and mutually profitable business or banking relationships. We settle a lot of things over a cup of coffee and we expect to continue to do that. Most of the time when you have to end up in court it means not only that the deal has fallen apart, but that the relationship has fallen apart. That is not a good recipe for making money.

Finally, it should be pointed out that although states are generally obliged to honor their contracts and be subjected to suits for their enforcement and the Federal Government is generally liable on its contracts and is subject to suit for their enforcement (subject to the various defenses previously alluded to) (a) it took a century or so for the existing state and federal sovereign immunity waivers to occur and even now not all contracts are enforceable against either states or the United States, and (b) the states have not agreed to subject themselves to (and no other law makes them subject to) suits

by private parties on their contracts in federal courts (because of the 11th Amendment immunity); and, the Federal Government is not subject to unconsented suits on its contracts in state courts, because it has not waived immunity for contract claims filed against the Federal Government in state courts.

Thus, neither the states nor the Federal Government have consented to suits on their contracts in the courts of a different sovereign. At the present time tribal courts are generally open for suits on contracts against the tribe itself in the tribal court as to which immunity has typically (but not always) been waived, but the tribes like the states and the Federal Government, have not consented to suit on their contracts in the courts of other jurisdictions and Congress has not required and should not require them to do so.

Imposing so drastic a change on the existing an longstanding allocation of jurisdiction between the state, federal, and tribal courts and as regards the doctrine of sovereign immunity would be a serious mistake, fundamentally at odds with the very notion of tribal sovereignty and the ability of Indian tribes to survive as separate peoples, with our separate languages, customs, and traditions. Subjecting us to state jurisdiction would severely threaten what is uniquely Indian about our communities. We are not just business owners, we are also tribal communities having a special government-to-government relationship with the United States. Far more is at stake in the jurisdictional and immunity changes proposed in S. 1691 than enforcement of commercial contracts.

For these reasons, we urge your Committee not to report S. 1691 out to the Senate and to continue to resist similar proposals for changes in the existing law regarding jurisdiction and sovereign immunity as they arise.

Sincerely,

PHILLIP MARTIN
Tribal Chief

Testimony of W. Ron Allen, President

National Congress of American Indians

Before the United States Senate Committee on Indian Affairs

Oversight Hearing on Tribal Government Sovereign Immunity

March 11, 1998

I. INTRODUCTION

Good morning Chairman Campbell, Vice-Chairman Inouye, and distinguished members of the Committee. It is an honor to be invited to provide testimony before the Senate Committee on Indian Affairs. I am W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe and President of the National Congress of American Indians (NCAI). As the oldest and largest national Indian advocacy organization in the United States, the NCAI is dedicated to advocating on behalf of our member tribal governments on a myriad of issues, including the issue of tribal government sovereign immunity. The specific focus of today's hearing is on tribal government immunity for contract claims and for state retail sales taxes, but for purposes of the record, I would like to briefly review the context in which today's hearing takes place.

Tribal governments and their supporters in Congress joined efforts in the first session of the 105th Congress to defeat a series of budget riders intended to limit tribal government sovereign rights. The most dangerous of these riders was a provision included by Senator Slade Gorton, Chairman of the Senate Interior Appropriations Subcommittee, in his chairman's mark of the fiscal year 1998 Interior appropriations bill (H.R. 2107). This provision, Section 120, would have (1) required Indian tribal governments to waive all sovereign immunity against suit as a condition of receiving federal funds and (2) authorized actions against tribal governments to be heard in federal courts rather than tribal courts. This proposal to force tribes into an unlimited waiver of their sovereign immunity and remove tribal court jurisdiction would have put tribal self-governance at extreme risk. Tribal government executives, legislators and judges would have been subject to immense lawsuits, whether they acted or failed to act, and tribal courts would have been rendered irrelevant. No government, include the federal and state governments, could long operate under these conditions.

The efforts of tribal governments and their supporters to defeat this rider won the support of the majority of the Senate and Senator Gorton agreed to an amendment to the Interior Appropriations bill that would remove Section 120. However, as a part of the agreement Chairman Campbell committed to hold hearings on tribal sovereign immunity. The hearing that the Committee is holding today, along with the two upcoming field hearings, will fulfill that commitment.

At the time this agreement was made, Senator Gorton also indicated that he would introduce a bill addressing tribal sovereign immunity. On February 27, 1998, Senator Gorton introduced S. 1691, the "American Indian Equal Justice Act." Although more detailed in its mechanisms, the bill is similar in scope to Section 120. S. 1691 contains extremely broad waivers of tribal sovereign immunity and would subject tribal governments to virtually any type of law suit in both federal and state courts. Indeed we find it ironic that Senator Gorton is an advocate of capping damages claims, yet would propose to expose tribal governments to unlimited damages claims. Like Section 120, S. 1691 would make it nearly impossible for tribal governments to carry out basic governmental functions and would jeopardize the resources and future of tribal governments.

In NCAI's view, the proponents of S. 120 and S. 1691 have engaged in a campaign of misinformation against tribal self-determination. Relying on slanted anecdotes and broad unsupported generalizations about the "unfairness" of tribal sovereign immunity and tribal courts, the sponsors have played upon the common misunderstandings about tribal governments. There is inadequate understanding in the general public and in Congress that an Indian tribe is a form of government recognized in the U.S. Constitution and hundreds of treaties, court decisions and federal laws. There is inadequate understanding that tribal governments provide the basic governmental functions such as law enforcement, justice, and education on Indian lands throughout this country. There is inadequate understanding that the vast majority of tribal governments are modern, democratic, fair and as deserving of respect as any other form of government.

This general lack of understanding about tribal governments could also result in a failure to recognize that Section 120 and S. 1691, while cloaked in words of fairness, are designed to render Indian tribes impotent to protect their lands, resources, cultures and future generations and extinguish hundreds of years of federal Indian policy that protects tribal self-government. As Felix Cohen observed, "confusion and ignorance in fields of law are allies of despotism."

As a result, NCAI would like to extend its sincere thanks to the Chairman and Vice-Chairman and many other members of the Committee for this hearing and their efforts to understand and convey the message of tribal self-governance. The information following and other testimony will clearly show that tribal governments exercise a form of sovereign immunity that is similar in scope to the immunity exercised by state, federal and local governments. Parties who may be harmed by tribal government activities do have an opportunity to be compensated and to have their case heard by a competent tribal judge. Like other forms of government, tribal governments are not perfect, but any solutions should be based on careful study of the true circumstances and guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to engaging in that process with the Committee.

II. General Background on Sovereign Immunity

Governmental immunity from suit is an inherent right of all governments, including the federal, state and tribal governments, for reasons of sound public policy. The purpose served by this policy is to provide special protection against loss of assets held in common for many people for the performance of vital government functions. Since 1946, the federal government, most states and many tribes have provided limited waivers of sovereign immunity that allow these governments to be sued when the government functions in the same manner as a private individual, such as when a government employee gets in a car accident. However, the federal government, states and tribes have retained sovereign immunity in broad areas in order to protect governmental functions from lawsuits and limit the size of damages claims.

A. Sovereign Immunity of the Federal Government

In 1946, Congress passed the Federal Torts Claims Act (FTCA),[1] which exposes the United States government to limited liability for certain tort claims in the same manner as a private individual, but not liability for interest prior to judgment or for punitive damages. In addition, any claim for money damages must first be presented to the appropriate federal agency. In 1988 amendments to the FTCA, Congress clarified and strengthened the federal government's right to any defense based upon judicial or legislative immunity. Congress waived sovereign immunity for certain contract actions in 1887 under the Tucker Act.[2]

Under these statutes, the federal government has retained its rights to sovereign immunity in broad areas, including those functions that are inherently "governmental." For instance, a postal consumer may not collect damages from the U.S. Postal Service for failure to deliver mail;[3] and a federal agency may not be sued for a procedural error in promulgating regulations.[4] In addition, the judicial and legislative functions are specifically protected from lawsuits. The prohibition on punitive damages also provides a significant limitation on the size of awards.

B. Sovereign Immunity of State and Local Governments

The sovereign immunity of state governments from suit is specifically guaranteed under the Eleventh Amendment to the Constitution.[5] This Eleventh Amendment sovereign

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[1] 28 U.S.C. §§ 2671-2680.

[2] 28 U.S.C. § 1491.

[3] *Pruitt v. United States Postal Service*, 817 F. Supp. 807 (ED Mo 1993).

[4] *C.P. Chemical Co. v. United States*, 810 F.2d. 34 (CA2 NY 1987).

[5] *"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."*

immunity was reaffirmed in two recent Supreme Court cases to the detriment of Indian tribes trying to establish their federally guaranteed rights.[6]

Many, but not all, state governments have passed statutes similar to the FTCA that provide limited waivers of immunity, but provide limitations on damages and retain state immunity for governmental functions. Along with the prohibition on punitive damages, a growing trend is for state governments to impose a ceiling on the amount of recoverable damages. Although the dollar amounts vary, many states have adopted a cap of $100,000 for injuries arising from a single occurrence.[7] Some states set lower caps for property damage claims.[8] In at least two states, Massachusetts and Texas, there are no general statutory waivers. Instead, the state legislature considers each application for waiver on a case-by-case basis. Local and municipal governments also retain sovereign immunity subject to state law. In general, most states have passed laws which retain the governmental function immunity of local and municipal governments.[9]

In *Bogan v. Scott-Harris*, on March 3, 1998, the United States Supreme Court upheld absolute immunity from civil liability for local legislators engaged in legislative activities. *Bogan* unanimously affirms that federal, state and local officials often have absolute immunity from lawsuits. *Bogan* also illustrates the error of the proposed finding in S. 1691's Section 1(b)(5) that only tribes maintain the full scope of immunity from lawsuits. As the Court notes "officers of a municipal corporation [as well as other legislators] . . . invested with legislative powers . . . are exempt from individual liability for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into." Furthermore, the Court points out that States and the federal government are "often protected by sovereign immunity" even for constitutional violations.

C. Sovereign Immunity of Tribal Governments

Like the federal and state governments, many tribes have voluntarily provided for limited waivers of their immunity[10] and/or have insurance to cover their potential liability.[11] This

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[6] *Idaho v. Coeur d'Alene Tribe of Idaho*, 1997 WL 338603 (U.S.); *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).

[7] *See*, e.g., Ala. Code 11-93-2 (1992); Fla. Stat. Ann. 768.28(5) (Harrison 1992); Okla. Stat. Ann. Tit. 51, 154 (West 1993).

[8] *See*, e.g., Okla. Stat. Ann. Tit. 51, 154(A)(1) (West 1993) ($25,000); Tex. Civ. Prac. & Rem. Code Ann. 102.003 (West 1986) ($10,000).

[9] *See*, Antieau, 1A Local Corporation Law §11A.00 et. seq.

[10] *See*, Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986) (stating that tribal ordinance bars use of sovereign immunity); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (finding express waiver of immunity in severance tax ordinance).

[11] Joseph Calve, *Pequots Won't Gamble on Lawsuits at New Casino*, Conn. L. Trib., Mar. 2, 1992, at 1. NCAI's informal sampling indicates that a substantial proportion of tribal governments carry insurance.

is a growing trend evidenced by an increasing number of civil claims handled by tribal courts.[12]

Tribes and tribal officials also are subject to suit under various exceptions to tribal sovereign immunity recognized by the courts. For example, courts have applied the *Ex Parte Young* doctrine to tribal officials.[13] This doctrine creates an exception to the general rule of sovereign immunity when an official acts outside of the government's authority. Tribal sovereign immunity also has been limited by various courts where allegations of personal restraint and deprivation of personal rights were raised.[14] In addition, pursuant to federal law, Indian tribes, contractors and employees are deemed to be agents of the federal government for the purposes of the FTCA when a tribal government program operates with federal dollars.[15]

Tribal governments dealing in commercial contexts routinely agree to include limited immunity waivers in contracts, including bonding and insurance requirements. Negotiation of these limited waivers is a widely-practiced prerequisite to contracting with tribal governments. In addition, many tribes have specifically waived sovereign immunity for tribal businesses incorporated pursuant to the Indian Reorganization Act.[16]

D. Conclusion

Sovereign immunity is no anachronism, but is alive and well as a legal doctrine that protects the functions of government from litigation and damages claims.
The discussion above illustrates that tribes are certainly not protected by an impermeable shield of sovereign immunity, but like the federal government and states, assert limited immunity. Senator Gorton's proposal to completely waive tribal sovereign immunity would place the governmental authority of tribes at extreme risk.

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[12] See, The Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, The Tribal Court Record, Spring/Summer 1996, at 12.

[13] See, Susan M. Williams, Esq., Testimony Before the Committee on Indian Affairs, U.S. Senate, September 24, 1996.

[14] Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 515 F.2d 926 (10th Cir. 1975).

[15] Indian Self-Determination and Education Assistance Act and related acts. Pub. L. No. 101-152, Title III, 104 Stat. 1959 (codified at 25 U.S.C. § 450).

[16] Boe v. Ft. Belknap Indian Community, 455 F. Supp. 462, 463 (D. Mont. 1978); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1135 (Alaska 1978); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980)

III. State Retail Sales Tax Collections

The treatment of state and local taxes on Indian lands has been effectively handled at the tribal-state level for many years because the states currently have adequate legal remedies to pursue in collecting taxes on sales to non-tribal members that occur on Indian lands. According to a report issued by the Arizona Legislative Council,[17] there are a number of "alternative taxation methods" now employed by states and tribes that provide for the collection of retail taxes on sales involving non-members. As the report makes clear, more than 200 tribes in 18 states have created successful state-tribal compacts that are now in force and are mutually satisfactory to both parties.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and subsequent cases, the United States Supreme Court has held that tribes are required to collect sales taxes on non-Indian purchases of imported goods in certain situations. The Supreme Court has detailed the remedies available to a state in the event that it cannot reach an agreement with a tribe for the collection of retail sales taxes. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991), the Court identified a number of ways that a state can collect a lawfully imposed tax:

> There is no doubt that sovereign immunity bars the state from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions by the state. And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax.

The Court's recent decision in *Bogan* also shows that an immunity waiver for collection of state taxes, such as Section 3 of S. 1691, is unnecessary. In *Bogan*, the Supreme Court reaffirmed *Amy v. Supervisors*, 11 Wall. 136 (1871), in which local legislators were held liable for violating a court order to levy a tax sufficient to pay a judgment because the court order had created a ministerial duty. The Court said there, "[t]he rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct." *Id.* at 138. After *Bogan*, it is clear that tribal immunity need not be abolished simply to help states enforce the requirements that tribal agents and officials create records and collect certain taxes lawfully imposed by the states on non-members purchasing imported goods on Indian reservations. Section 3 of S. 1691 would propose to solve a problem that has not existed since 1871.

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[17] "STARTED: State-Tribal Approaches Regarding Taxation & Economic Development", Arizona Legislative Council, November, 1995 at 81. See generally, 81-105.

Much of the attention to this issue of tribal collection of state retail sales taxes has arisen in the wake of the Supreme Court's decision in *Oklahoma Tax Commission v. Chickasaw Nation* 115 S.Ct. 2214 (1995). The Court ruled that the legal incidence of the state tax fell on the tribal retailer in Indian country and, as such, was invalid because it was not authorized by the Congress. For a very brief time, tribal governments in Oklahoma could avoid paying the state tax on motor fuels. However, the Court noted that the Oklahoma state legislature could simply amend its law to declare that the legal incidence falls on the retail consumer. The Oklahoma Legislature responded by amending the state tax laws in 1996 to shift the legal incidence of the tax to the consumer.[18] Oklahoma has also entered into tax agreements with nine tribes. These agreements provide that the State collects a motor fuels tax at the distributor level before any fuels enter Indian country. The State then pays the tribes a certain percentage of all taxes collected that reflects the consumption by tribal members.

Despite the resolution in Oklahoma and the settlement of this issue in nearly every other state that contains Indian country, the brief period of tribal exemption in Oklahoma has fueled a spiteful rumor mill among truck stop and convenience store owners that Indian tribes have the ability to avoid state taxes and are threatening to take over these businesses throughout the country. Tribal governments simply do not have these powers, and federal policy should not be made on the basis of exaggerated accounts with little basis in reality.

A fundamental principle of sound federal policy making is to avoid federal intrusion whenever local parties are already reaching agreement. Each state has the necessary authority to resolve its taxation issues with tribal governments. Federal intervention under these circumstances would be inconsistent with the long-standing policy of tribal self-determination. New federal legislation in this area could also cast doubt on the validity of the many existing agreements and create new burdens and turmoil in many states. Section 3 of S. 1961 would take a heavy-handed national approach that would cause far more problems than it would resolve. The federal government should allow the current process to continue its successful course.

III. Sovereign Immunity In Contracting

The issue of tribal sovereign immunity for contract obligations has arisen only in very recent years, as more tribal governments have begun to have the financial resources to enter into commercial transactions. In NCAI's view, this area of tribal government law and policy should be allowed to evolve, without Congress getting into the business of micromanaging contracts between tribal governments and other willing parties.

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[18] Oklahoma Statutes, Title 68, Section 500.63.

No Indian tribe, and no person or entity interested in doing business with a tribe, is ever forced to enter into a contract against its, his or her will. It is axiomatic that the terms of the contract must be acceptable to each party entering the contract. Each party has the simple right to refuse to enter into the deal. This fundamental principle ensures that tribal government sovereign immunity cannot be used to unfairly disadvantage any individual or entity contracting with a tribal government.

In addition, the federal, state and local governments all have sovereign immunity for contracts and each has created limitations on sovereign immunity in its own way, at its own time, in order to foster contracting. Tribal governments have this same ability. Every tribal government is at a different place in its contracting sophistication. A general federal legislative solution might work well for some tribes, but might create limitations for some or expose others to an undesirable degree of risk.

The provisions of S. 1691 would reach deeply into what are essentially private transactions, when clearly there is no need for the federal government to "protect" contracting parties from tribal immunity. Tribal governments have created many ways to accommodate the interests of contracting partners. From direct waivers, to insurance and bonding requirements, to choice of forum provisions, tribes have found solutions acceptable to both parties in thousands of contracts.

Just as the federal government and the states have had to resolve the issues of their sovereign immunity in their own ways, the tribes have to deal with their sovereign immunity in ways that respect their own traditions and circumstances. The tribes and the business community have been effective in reaching agreement on solutions. There is no need for the federal government to intervene and prevent the continued evolution in this area among willing parties.

IV. Tribal Courts

Indian tribes' inherent authority for self-government includes the power to adjudicate disputes. Although tribal court criminal jurisdiction over non-Indians has been sharply limited by the federal government,[19] tribes retain significant authority to adjudicate civil disputes involving non-Indians that arise on Indian land or otherwise affect the interest of the tribe or its members.[20] As Congress has found, tribal courts are "important forums for ensuring public health and safety and the political integrity of tribal governments." They are "the appropriate forums for the adjudication of disputes affecting personal and property rights," and they are "essential to the maintenance of the culture and identity of

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[19] *See generally*, F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 335.

[20] National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).

tribes...."[21]

Senator Gorton's proposed legislation to grant jurisdiction to the federal and state courts to any action against an Indian tribe constitutes a great threat to the sovereignty of tribes and the tradition of local tribal control over tribal matters. The essence of tribal sovereignty is the tribal right to govern persons and property located within Indian lands under laws adopted by tribal governing bodies and enforced in tribal courts. Yet the dominant purpose of the proposed legislation appears to be to circumvent tribal courts and tribal laws in favor of civil litigation in federal and state courts. Since tribal courts are the final authorities on tribal law, and federal and state courts generally do not interpret and enforce tribal law, authorizing federal courts to resolve civil matters arising on Indian lands would encourage the bypass of tribal laws, and thwart the self-determination of tribal governments.

Senator Gorton's proposal to grant direct jurisdiction over tribal governments to state and federal courts is based on an assertion that tribal courts are not "neutral" forums. The reality is that there are no "neutral" forums to be found at any level of government. Each court has its own legal and philosophical views. The evolution of the U.S. Supreme Court over time is the most notable example of this condition. A tribal court is more likely to be steeped in knowledge of tribal government law and to support the legitimacy of the tribal government. This is not a bias, but a legal and philosophical viewpoint that supports tribal self-governance.

As with any court, the issue with tribal courts is not neutrality, but integrity and competence. Rather than flood federal and state courts with claims against tribes, tribal courts need to be strengthened. Tribal courts have come a long way in recent years, but many lack necessary resources. The federal government has a responsibility to help tribes build their judicial systems so that they can meet the standards that are expected in the United States. Congress recognized this obligation in 1993 by enacting the Indian Tribal Justice Act.[22] This law is designed to give tribal governments the resources they need to develop their court systems. The Act authorizes $57 million in spending on tribal courts, yet to date not one penny of the Act has been funded. NCAI strongly supports full funding for the Indian Tribal Justice Act as a proactive solution for improving tribal courts while protecting tribal self-governance.

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[21] Indian Tribal Justice Act, 25 USC §3601.

[22] 25 U.S.C. §§3601 et. seq.

V. Conclusion

NCAI would like to extend its sincere thanks to the Chairman and Vice-Chairman and the many other members of the Committee for this hearing on matters that are so critical to tribal self-governance and the cultures and futures of Indian people. As the Committee searches for solutions to the issues that have been raised today, NCAI would encourage the Committee to bear three points in mind. First, broad generalizations and one-size-fits-all solutions have a tempting ease, but have proven to have disastrous effects when applied among the diversity of Indian Nations in this country. A comprehensive review of the variety of circumstances and specific issues is far more likely to lead to workable solutions. NCAI is greatly encouraged that the Committee has already begun such a review. Second, many of the issues that have been raised today involve matters of purely local concern that can be resolved on the local level among the tribes, states and individuals. The role of the federal government in these instances should be to encourage local cooperation, rather than to create new legislation that could have broad, unintended consequences. Third, and finally, any solutions should be guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to working on these challenges with the Committee.

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TESTIMONY OF MARK A. JARBOE
PARTNER IN DORSEY & WHITNEY LLP

Before the United States Senate Committee on Indian Affairs
Oversight Hearing on Tribal Sovereign Immunity
March 11, 1998

INTRODUCTION

Mr. Chairman, my name is Mark Jarboe. I am a partner in the Minneapolis, Minnesota office of the law firm of Dorsey & Whitney LLP, and am the Chairman of the firm's Indian Law Practice Group. I have practiced law in Indian Country for 13 years, primarily in the areas of finance, tribal governmental regulation and reservation economic development. I am honored to be invited to present this testimony to the Committee on the issue of tribal sovereign immunity in the contexts of contracting and the collection of state sales taxes.

Dorsey & Whitney is an international firm of over 450 lawyers and represents 36 Indian tribal governments in 15 states. We also represent people and businesses doing business with tribes—including commercial banks, investment banks, leasing companies, construction contractors, equipment suppliers and service providers. As such, we have seen the issue of tribal sovereign immunity addressed in many circumstances and from many points of view. While I will present some information at the end of my remarks on the issue of the collection of state sales taxes, my friend and co-panelist, Reid Chambers, will testify more directly on that point. The principal observation that I would like to make this morning is that tribal sovereign immunity is not an obstacle to contracting with Indian tribes. It is an issue in contracting, yes—an issue that must be addressed and dealt with. But it is no more of an obstacle than many other issues that will arise in any contract

negotiation and that likewise must—and can—be dealt with to the satisfaction of both contracting parties.

I. SOVEREIGN IMMUNITY IN CONTRACTING

A. The Expansion of Economic Development in Indian Country.

Until the recent improvements in the financial situation of some tribes, fueled in many cases by gaming but also by recreation, tourism, natural resource development and tribal business diversification efforts, economic activity in Indian Country was minimal. Very few tribes had the financial wherewithal to enter into contracts of any size for any purpose, and mainstream American business did not pursue what opportunities did exist with the tribes. Business in Indian Country was, with few exceptions, left to local, small-scale establishments to pursue. Those local establishments entered into transactions often on a cash, not credit, basis, or extended "credit" to a tribe only if the tribe's obligation was fully collateralized by cash deposits or other marketable collateral. The tribes generally refused to waive their sovereign immunity in those contracts, but in such a situation the sovereign immunity of a tribe is not a significant issue. If a tribe has fully performed its side of a bargain (for example, by paying cash up front) or has fully collateralized its obligations with cash or other security, the fact that the other party may not have the ability to sue the tribe under the contract is of little moment—that party will likely have no occasion to have to sue.

The situation started to change dramatically in the present decade. Some tribes began to have financial resources sufficient to enable them to enter into commercial transactions of significant size. These tribes sought to open lines of credit, to borrow money and to issue bonds. They sought to build new buildings on the reservations, often starting with gaming facilities and then continuing on to include tribal schools, clinics and administrative buildings. They sought to obtain equipment, to contract for services and, in general, to enter the stream of American commerce.

On the non-Indian side, American business began to recognize, albeit slowly, new opportunities with the tribes. Banks and investment bankers considered making loans or underwriting the issuance of tribal debt securities. Construction companies bid to build tribal buildings. Equipment suppliers and service providers recognized a new market for their offerings. However, when these new players started to become active in Indian Country, they quickly encountered the principle of tribal sovereign immunity and, at first, did not know how to respond to it.

B. The Evolution of Sovereign Immunity.

Sovereign immunity is the right of a sovereign government not to be sued in any court unless it first gives its consent to be sued. All governments in this country enjoy sovereign immunity: the federal government, the state governments, municipal governments and tribal governments. Just last week the Supreme Court handed down a decision reaffirming the sovereign immunity enjoyed by municipal governmental officials in carrying out their legislative duties. In the contractual context, court decisions and legislative actions have qualified and modified the sovereign immunity of the federal, state and municipal governments so that people—if they know the rules—are able to contract with those governments and to have an ability to enforce their contractual obligations. For the federal, state and municipal governments, that process took decades; with respect to the sovereign immunity of tribal governments, the process is now underway. However, it is a process that, like the similar processes that took place with the other governments, should be carried out by the tribes themselves and the people with whom they deal.

This last point deserves special attention. It is based on two very important facts:

1. No one is forced to enter into a contract. Contracts are voluntary transactions, entered into by willing parties.

2. Each government that has decided to modify its sovereign immunity has done so in its own way, at its own pace, and in the manner it judged most appropriate for its circumstances.

Please permit me to elaborate.

1. Freedom of Contract. No tribe, and no person or entity interested in doing business with a tribe, is ever forced to enter into a contract against its, his or her will. In order for any two parties to enter into a contract, the terms of that contract must be satisfactory to both of them. Certainly, there will be provisions that favor one side or the other, and almost always both sides would like to add provisions that do not appear, or delete provisions that do appear, in order to make the final agreement even more attractive to that side. But if both sides agree upon a set of terms, then each side has determined that, when all of the advantages of the bargain are toted up and set against all of its disadvantages, the advantages outweigh the disadvantages.

In any contract with an Indian tribe, the issue of the tribe's sovereign immunity is one issue that must be addressed. It can be addressed in any number of ways, from a complete refusal on the part of the tribe to any suit against it in any forum, to an ability of the nontribal party to sue the tribe in any court and without

any limitation on recourse, or by any of a number of intermediate positions (some of which I shall describe below). How that issue is resolved is a matter for the parties to decide; the point that I wish to emphasize is that the parties are able to resolve it, and must resolve it to their satisfaction, or else no contract will result.

If a tribe seeks to borrow money from a bank, the bank will likely insist on having a means to enforce the obligation of the tribe to repay the loan. Because the tribe has sovereign immunity, unless the tribe makes some concession to the bank so as to enable the bank to sue the tribe upon default, it is almost inconceivable that the bank will make the loan. 1/ The tribe and the bank may engage in a give-and-take on the issue. They may consider arbitration, a limited waiver for suits in tribal court, a waiver for suits in state court (in a Public Law 280 jurisdiction), or the use of a separate tribal instrumentality or corporation to be the borrower. The tribe may negotiate that, in exchange for a waiver of immunity more favorable to the bank, the bank must concede on some other point or points in the contract in favor of the tribe. However, the tribe and the bank will have to come to a mutually acceptable resolution of this issue or else no loan will be made. How they decide to resolve it is up to them in the context of their particular contract.

2. Any Modification of a Government's Sovereign Immunity is a Decision for that Government Itself to Make. The federal, state and municipal governments all enjoy sovereign immunity. Those governments have seen fit to modify their immunity and to permit suits to be brought against them in certain circumstances and subject to certain limitations. In each case, however, the modifications that were made, and the resulting recourse that claimants have against those governments, were made over time, by the courts and legislatures of those governments themselves, and were not imposed on them from above.

Each state has dealt with limitations on its sovereign immunity differently. While the National Conference of Commissioners on Uniform State Laws has promulgated nearly 200 model statutes for states to adopt, ranging from the Uniform Commercial Code to the Uniform Act to Secure Attendance of Witnesses From Without a State in Criminal Proceedings, there is no "Uniform Waiver of Sovereign Immunity Act." State immunity waivers may be limited to certain types of claims and may be conditioned on actions being brought in specific forums, on

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1/ An exception to this would be the types of loans that, unfortunately, we still see in Indian Country—loans that are not made unless the tribe first deposits with the bank as collateral cash or investment securities in an amount in excess of the amount of the loan. Because the bank can exercise setoff rights against such collateral, it can, upon any default by the tribe, make itself whole without the need of commencing any enforcement action. However, a loan of this nature is essentially the bank lending the tribe's own money back to it, and is not a true extension of credit.

notices of claims being given within short timelines, or on suits being filed within strict limitations periods. 2/ Damage awards may be capped. Specific performance may be unavailable. All of these issues and more are dealt with by each state in the manner it deems most appropriate for its circumstances, and the decision of one state on any of these points is likely to be different from the decision of its neighbor.

Until the recent increase in economic activity in Indian country, tribal governments have not had any serious need to address the issue of how sovereign immunity affects their ability to contract. Their improving economic status has caused many tribes to reconsider their treatment of immunity. 3/ The result has been an evolution of tribal positions on this issue, an evolution that roughly parallels developments with federal, state and local immunity in the beginning of this century. That evolution will continue, and if left to proceed will result in solutions that both accord with tribal policies, culture and governmental structures and meet the needs of non-Indian contracting parties.

C. Examples of Tribal Solutions.

Tribes have explored many ways to accommodate the legitimate interests of non-Indian contracting parties. A few are described below. In providing this summary, I am referring to transactions in which I was personally involved; there are undoubtedly many others, some similar to the following and some quite different, where tribal governments developed innovative and effective solutions to deal with the sovereign immunity issue.

2/ It is worthy of note that one of the groups most adversely affected by the remaining immunity enjoyed by the states are the tribes themselves. After the Supreme Court ruled in Seminole Tribe of Florida v. Florida that the Eleventh Amendment to the Constitution prohibited the federal courts from taking jurisdiction over a suit brought by a tribe against a state in order to enforce the state's federal obligation to negotiate a gaming compact under the Indian Gaming Regulatory Act, tribes explored bringing those suits in state courts but found that without a waiver of the state's immunity, no such suit could be brought.

3/ In the early 1990's, a tribe refused to waive sovereign immunity in connection with a proposed water system loan from the United States Farmers Home Administration, even though, under case law, tribes do not enjoy sovereign immunity in suits brought by the federal government. The Tribal Council took the position then that the tribe should not waive its sovereign immunity in any situation. That same tribe has recently borrowed over $50,000,000 from a consortium of banks under an agreement wherein it consents to suit in any court of competent jurisdiction to enforce its loan obligations.

1. Las Vegas Paiute Tribe. The Las Vegas Paiute Tribe is developing the Las Vegas Paiute Resort, a destination golf resort on 4,000 acres of trust land just outside of Las Vegas, Nevada. The Tribe sought financing for that project for over two years—financing a golf resort on Indian lands is not one of the easiest of tasks. It eventually succeeded, with interim financing from two bond funds (Calvert Funds in Maryland and Miller & Schroeder Financial, Inc. in Minneapolis) and permanent financing of over $25,000,000 from Bank of America.

In preparation for obtaining this financing, the Tribal Council, in 1993, took three specific actions:

a. It called for a tribal election, to be conducted by the Secretary of the Interior, to adopt an amendment to the Tribe's Constitution adding a "no impairment of contracts" provision similar to the provision of Article I, Section 10, Clause 1 of the United States Constitution. 4/ The election was held on April 9, 1994 and that provision was adopted. 5/

b. It established a tribal governmental instrumentality, the Snow Mountain Recreational Facilities Authority, to act as the borrower of the financing for the project, to lease the site of the project from the Tribe, and to be able to grant to the lender a leasehold interest on the project to secure the repayment of the financings.

c. It established the Tribal Commercial Court as a division of the Las Vegas Paiute Tribal Court. The Tribal Commercial Court, which has jurisdiction over all civil matters involving the Tribe where the amount in controversy exceeds $50,000, has the following attributes:

4/ The "contracts clause" of the United States Constitution, which prohibits the states from taking any action under their governmental powers to impair the obligation of contracts, does not apply to the federal or tribal governments.

5/ The provision, Article X of the Las Vegas Paiute Constitution, reads:

ARTICLE X -- IMPAIRMENT OF CONTRACTS

The Las Vegas Paiute Tribe shall not adopt any law, ordinance, measure or resolution, whether under Articles VII [dealing with the powers of the Tribal Council] and VIII [dealing with initiative and referendum] hereof or otherwise, impairing the obligation of contracts of the Las Vegas Paiute Tribe or of any instrumentality, agent, corporation or member of the Las Vegas Paiute Tribe.

i. The judges of the division are lawyers licensed to practice in any state within the Ninth or Tenth federal circuits;

ii. The Division applies the substantive contract law of the State of Nevada in all cases before it; and

iii. The rules of the Nevada Uniform Commercial Code apply with respect to the creation and perfection of security interests. 6/

On this last point, it is essential to note that the Las Vegas Paiute Tribal Commercial Court, while looking and acting a lot like a state or federal civil court, is a tribal court, is created under tribal law, and functions as an arm of tribal government. The federal government and many state governments have specialized courts for specialized purposes: the federal government has, in addition to the federal district courts, courts such as the Court of Federal Claims, bankruptcy courts, tax courts, and military courts; states have civil courts, criminal courts, juvenile courts, probate courts, family courts—whatever areas the government determines need to be addressed by specific methods of dispute resolution. A tribal government has the same power, and can decide that certain types of disputes should be heard by specialized subdivisions of its tribal court system. This is what the Las Vegas Paiute Tribe, and other tribes who have acted similarly, 7/ have done.

After the Tribe took these actions, it was able to focus the attentions of prospective lenders on the economic and credit issues presented by the proposed project—where the attention of a lender should be focused. The Tribe's experience both with the bond funds and with Bank of America was that its actions in anticipating the legitimate needs of its lenders, coupled with an agreement by the Tribe and the Authority that they could be sued in the Tribal Commercial Court to enforce the loans, satisfied the enforcement concerns of the lenders. The Tribe has taken out four separate multi-million dollar loans from Bank of America as the project has grown, all ultimately enforceable in the Tribal Commercial Court.

2. Cow Creek Band of Umpqua Tribe of Indians. Earlier this month, the Cow Creek Band of Umpqua Tribe of Indians was negotiating a contract between its Nesika Health Group (Nesika), a business enterprise wholly owned by the Tribe, and a provider of specialized services needed for the Tribe's health program. The service

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6/ A copy of Title 1 of the Las Vegas Paiute Tribal Law and Order Code, establishing the Tribal Court and the Tribal Commercial Court, is attached to this testimony as Exhibit A.

7/ Other examples include the Cow Creek Band of Umpqua Tribe of Indians and the Mohegan Tribe of Connecticut.

provider had never before faced the issues presented in contracting with tribes and initially took the position that any dispute under the contract should be resolved in Oregon state court (a legal possibility, given that Oregon is a Public Law 280 state, but of uncertain effect given that Oregon state courts have not ruled on whether the abstention doctrine, set out by the United States Supreme Court in the National Farmers Union and Iowa Mutual cases, applies to actions brought in state court). 8/ The Tribe was unwilling to consent to Oregon state court jurisdiction, but was willing to permit Nesika to be sued by the service provider in the Cow Creek Tribal Court should the Tribe default under the contract. That result was unacceptable to the provider.

The solution that was reached was another example of tribal government flexibility:

a. The Cow Creek Tribe had previously established a Tribal Commercial Court similar to that established by the Las Vegas Paiute Tribe and enacted a Tribal Arbitration Code. Under that Code, an agreement in a contract which provides that disputes thereunder are to be referred to arbitration is specifically enforceable as a matter of tribal law. Any action brought in Tribal Commercial Court to compel arbitration shall be enforced by the Tribal Judge. Questions as to whether a dispute is arbitrable are for the arbitrators to decide, and any award resulting from the arbitration shall be confirmed and enforced by the Tribal Commercial Court as issued by the arbitrators, without modification by the court. 9/

b. Nesika and the service provider agreed that any dispute between them would be referred to arbitration under the Tribal Arbitration Code, using the commercial arbitration rules of the American Arbitration Association.

c. Nesika consented to be sued in courts of competent jurisdiction in order to enforce its obligations under the contract, particularly the

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8/ The abstention doctrine provides that if both a federal court and a tribal court have jurisdiction over a matter and the case is brought in federal court, the federal court must abstain and let the matter proceed in tribal court. The law has not been resolved as to whether that same rule applies to cases in Public Law 280 states where state and tribal courts have concurrent jurisdiction. The Minnesota state courts have ruled that it does. Matsch v. Prairie Island Indian Community.

9/ A copy of the Cow Creek Tribal Arbitration Code is attached to this testimony as Exhibit B.

obligation to arbitrate any disputes. The consent specifically limited the amount of any damages that could be awarded against Nesika and provided that no recourse could be had against any assets of the Tribe other than those vested in its Nesika enterprise.

As a result, the position of the parties in the event of a default by the Tribe's Nesika enterprise under that contract is this: An action to enforce the contract will be resolved by arbitration. If the Oregon state courts would take jurisdiction over an action to compel arbitration, or to enforce an arbitration award, the provider can bring such an action there. If, however, the Oregon courts would apply the abstention rule, or if the provider wanted to initiate an enforcement action in the tribal forum, that action can be brought in the Tribal Commercial Court. This was a sufficiently satisfactory combination of remedies to the provider for the contract to be signed. 10/

3. Confederated Tribes of the Grand Ronde Community of Oregon (Spirit Mountain Development Corporation). The Grand Ronde Confederated Tribes have incorporated Spirit Mountain Development Corporation (SMDC) as a tribally-chartered corporation, 11/ and have chartered Spirit Mountain Gaming, Inc. (SMGI) as a wholly-owned subsidiary of SMDC. The Confederated Tribes are the sole owner of SMDC; SMDC, in turn, is the sole owner of SMGI.

The purpose of the establishment of SMDC and SMGI was to carry out business diversification activities on behalf of the Tribes. SMDC and SMGI both enjoy sovereign immunity, but both can waive that immunity without affecting the immunity enjoyed by the Tribes themselves.

10/ A similar structure was sufficiently satisfactory to a consortium of banks, lead by Bank of America, for them to provide a $350,000,000 credit facility to the Mashantucket Pequot Tribe, which has adopted a similar arbitration ordinance.

11/ As governments, tribes have the power to establish corporations. Tribal corporations can be chartered under a tribal corporation code (e.g., Ho-Chunk, Inc., chartered by the Winnebago Tribe of Nebraska; Colville Tribal Enterprise Corporation, chartered by the Confederated Tribes of the Colville Reservation), or by specific action of the tribal government (e.g., Little Six, Inc., chartered by the Shakopee Mdewakanton Sioux (Dakota) Community; the Mille Lacs Corporate Commission, chartered by the Mille Lacs Band of Ojibwe; Ketchikan Tribal Hatchery Corporation, chartered by the Ketchikan Indian Corporation). In many cases, tribal corporations are registered, with the Secretary of State of the state in which their chartering tribe resides, to do business in the state as foreign corporations.

When the Tribes sought financing for the development of their Spirit Mountain Resort, the Tribes contacted numerous financial institutions. The one that they selected was John Hancock Mutual Life Insurance Company, in Boston. John Hancock was willing to lend the Tribes $18,900,000 to finance this project, but, like the lenders described above, wanted to ensure its right to enforce the loan obligations against its borrower should a default occur. The solution agreed upon was this:

a. SMGI became the borrower of the loan.

b. The Tribe leased the resort site to SMGI, and SMGI became the developer and operator of the resort.

c. SMGI pledged all of the revenues derived from the operation of the resort to the lender and agreed to deposit those revenues daily into bank accounts pledged as security to the lender. Revenues would be released to SMGI out of those accounts monthly after all obligations under the loan were first provided for.

d. SMGI consented to be sued by the lender in the Oregon state courts (Oregon is a Public Law 280 state) and the federal courts to enforce its obligations under the loan documents, and waived any requirement on the part of the lender to exhaust remedies in the Grand Ronde Tribal Courts. Counsel to SMGI advised the lender that the waiver of the requirement to exhaust tribal court remedies was of uncertain enforceability. The Tribes themselves did not waive their sovereign immunity.

Although the question of whether, upon a default, the lender would be required to pursue its remedies in tribal, as opposed to state, court was not resolved with certainty, this arrangement proved to be sufficiently satisfactory to the parties that a second loan for an expansion of the original facility, in an amount in excess of $7,500,000, was made to SMGI by John Hancock on the same terms.

4. Confederated Tribes of the Colville Reservation (Colville Tribal Enterprise Corporation). The Colville Tribal Enterprise Corporation (CTEC) is a governmental corporation and instrumentality of the tribal government of the Confederated Tribes of the Colville Reservation in Washington. CTEC operates the business operations of the Colville Tribes, including the harvest and sale of tribal timber; the operation of a sawmill, wood products facilities, gaming facilities, and a marina; the rental of vacation houseboats on Lake Roosevelt; and the overseeing of the tribal credit operation. As an instrumentality of tribal government, CTEC enjoys sovereign immunity and it can waive that immunity without affecting the immunity of the Tribes themselves.

In 1996, CTEC sought to refinance a number of outstanding loans, primarily relating to the Tribe's timber sales and fabrication operations, and to open up a working capital line of credit. It negotiated with Key Bank of Washington for a $10,000,000 revolving and term credit facility to be secured by a pledge of most of CTEC's revenues, a security interest in certain personal property and a mortgage on CTEC's leasehold interest in the tribal sawmill. In the negotiations, CTEC agreed to waive its sovereign immunity in order to permit suits to enforce the loan and security, but only in the Colville Tribal Courts. The immunity of the Tribes themselves would not be waived. This was not even a significant issue in the negotiations. The contract was drafted to give either side the option to trigger arbitration if it desired, but then provided that any arbitration award would be enforced in the Colville Tribal Court. The bank accepted the Tribal Court as the forum for the enforcement of the contract and the loans were made.

D. Conclusion.

These are but a few examples; there are many more like them. They involve large amounts of money and small amounts; long term obligations and short term. In each case, the tribe involved and its contracting party have worked out how the issue of tribal sovereign immunity—how the other party can hold the tribe to its promise should the tribe default—will be dealt with in the contract. Common themes that we have seen include:

- Consenting to suit in tribal court, perhaps in connection with the establishment of a specialized commercial division of tribal court.

- Establishing a tribal arbitration code, providing that arbitration awards are specifically enforceable in tribal court and consenting to the jurisdiction of the tribal court in suits to compel arbitration or to enforce an arbitration award.

- Consenting to suit in state court in a Public Law 280 state.

- Establishing a tribal corporation, a Section 17 IRA corporation, [12/] or a tribal government instrumentality to serve as the contracting party, vesting in that entity sufficient assets or resources to carry out its obligations, and granting that entity the power to waive its sovereign immunity without waiving the immunity of the tribe itself.

In most cases, one or more of these solutions have proven sufficient to address the legitimate needs of the non-Indian party and to preserve the

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12/ A federally chartered corporation under Section 17 of the Indian Reorganization Act; 25 U.S.C. § 477.

governmental interests of the tribes involved. Sometimes they are not sufficient; occasionally the non-Indian party refuses to accept any result other than state court enforcement, and in those cases the parties usually cannot come to agreement. But there is no law that every proposed contract has to come into effect, and if the parties cannot reach agreement, that contract won't. That is their decision.

These solutions work. They have worked for hundreds of millions, if not billions, of dollars of contracts with tribes and tribal entities. But the solution that works in one situation, with one tribe, will not necessarily be the solution that works with another tribe, in another situation. Just as the federal government and each of the 50 states has had to deal with, and solve the difficulties created by, their sovereign immunity and to deal with them in their own ways, the tribes have to deal with their sovereign immunity in ways that respect their own traditions, structures and situations while accommodating the legitimate needs of others. That process often gets worked out in the give and take of voluntary contract negotiations. The tribes and the business community have been effective in reaching agreement on solutions; I respectfully submit that there is no need for the federal government to intervene and prevent the continued evolution in this area among informed, consenting parties.

II. STATE SALES TAX COLLECTIONS

In the context of the collection of state sales taxes on retail sales made to non-Indians in Indian Country, it is important to recognize that (A) many tribes and states have entered into arms-length tribal-state agreements providing for the imposition of state, tribal or joint taxes and the method of collection and distribution of their proceeds, and (B) even if there is no tribal-state agreement in place, states can collect taxes before the taxable items reach Indian Country. In addition, sales and excise taxes vary from state to state in their nature and legal format. As with the issue of sovereign immunity, the tribes and the non-Indian parties—in this case the states—are working matters out in ways that best suit their particular situations, needs and interests. There is no need for a federal imposition of uniformity, stopping the process in its tracks.

A. Tribal-State Tax Agreements.

Many states and tribes have entered into agreements covering how they will deal with retail sales and excise taxes. A few examples follow.

1. Minnesota. By the early 1980's, Minnesota had agreements with the 11 Chippewa and Dakota tribes in the state regarding cigarette, alcoholic beverage, and sales taxes. In 1994, the Minnesota Legislature amended then existing state law to authorize more comprehensive tax sharing agreements between the state and tribal governments. Today, the Minnesota Department of Revenue and the tribes have

each entered into tax agreements with respect to: (a) sales and use tax, including motor vehicle excise tax, (b) cigarette and tobacco products excise tax, (c) liquor tax, and (d) motor fuel tax.

Under the agreements, both tribal members and non-members must pay the equivalent of the state sales tax for transactions occurring on the reservation and state cigarette taxes for on-reservation cigarette purchases. Using a per capita formula, the Minnesota Department of Revenue refunds to tribes an amount attributable to taxes paid by enrolled members. The agreements authorize the State Tax Commissioner to collect the state and tribal taxes that are the subject of the agreements.

The agreements fix the estimated per capita amounts for each tax based on changes in the Consumer Price Index for the Minneapolis/St. Paul metropolitan area. To receive the per capita payments the tribal governing body must certify its population to the State Tax Commissioner.

The tribes and the state also share a "base tax." The base tax is the difference between the total tax from sales on the reservation and the tax attributable to enrolled member consumption. The total on-reservation cigarette, tobacco products and alcoholic beverage taxes are derived from quarterly sales by distributors to retailers located on the reservation.

The payment formula can be expressed in mathematical terms:

a. Per Capita Tax X Certified Population = Tax on Member Consumption

b. Tax Included in On-Reservation Sales - Tax on Member Consumption = Base Tax

c. Tax on Tribal Consumption + (Base Tax X 50%) = Payment

All vendors located on the reservation must purchase their stock from distributors licensed by the state and all cigarettes sold on the reservation must bear an Indian reservation tax stamp.

2. South Dakota. In South Dakota, agreements have been in place with four of the nine tribes in the state regarding sales and use taxes, and cigarette and contractors' excise taxes. These agreements were entered into in late 1970's, were amended numerous times and, although they expired last year, the tribes and the state are continuing to operate under them.

Under these agreements, the state collects a tribal tax which is equivalent to the state tax. Every transaction on the reservation of a compacting tribe is subject to

applicable sales, use, contractors' excise, or cigarette excise taxes, whether the sale is to an Indian or a non-Indian. The State collects the tribal tax, remits a percentage to the tribe, and keeps the remaining percentage. While there is no state tax imposed, the state does collect a 1% administrative fee.

3. Washington. Washington State has entered into agreements with several of the 26 tribes located in the state on motor fuel taxes and liquor taxes. In addition, Washington implemented a cigarette allocation system in 1980.

Pursuant to the motor fuel tax agreements, on-reservation Indian retailers are required to pay the state tax for all sales and to keep records of exempt sales. The state then refunds to the tribe the taxes paid on exempt sales. Alternatively, some motor fuel tax agreements require the tribe to purchase a percentage of tax-free fuel representing exempt sales to Indians.

Eighteen of the 26 tribes participate in the cigarette allocation program. A quota of tax-free cigarettes, determined by a per capita consumption formula, is set aside to be sold to tribal retailers. Wholesalers, who apply stamps to the cigarettes, pre-pay the cigarette taxes and receive refunds from the state for tax-free sales to tribes if they obtain approval from the State Department of Revenue prior to the sale.

4. Nevada. The State of Nevada has provided by statute that the state shall not collect state sales tax on the sale of tangible personal property on an Indian reservation if the tribe levies and collects a sales tax on retail sales at rates at least as high as Nevada's. Similarly, the Nevada Tax Commission has provided that the state excise tax will not apply to the sale of cigarettes on an Indian reservation if the tribe levies and collects an excise tax at rates at least as high as Nevada's. Nevada's interest appears to be to ensure that there is an equal tax burden on retail and cigarette sales, not to raise revenue from taxing transactions that arise in Indian country.

Under this authority, the state, through the Department of Taxation, and a number of tribes in Nevada have entered into intergovernmental agreements under which (a) the tribes agree to impose sales and excise taxes on the sale of tangible personal property and cigarettes, whether to Indians or non-Indians, at rates at least as high as Nevada's, (b) the Nevada state taxes do not apply to those transactions, and (c) the tribes retain the revenue generated by the tribal tax.

5. Oklahoma. Application of Oklahoma's motor fuels tax to sales in Indian Country was invalidated by the Supreme Court in the Chickasaw Nation case. The Court ruled that the legal incidence of the state tax fell on the tribal retailer in Indian Country and, as such, was invalid because it was not authorized by the Congress. The Court also recognized that Oklahoma could simply shift the legal

incidence of the tax so that it fell upon the ultimate retail purchaser, whereupon it could be legally imposed upon non-Indian consumers. The Oklahoma Legislature responded by amending the state tax laws in 1996 to shift the legal incidence of the tax to the consumer.

The State has also entered into tax agreements with nine tribes. These agreements provide that the State of Oklahoma collects a motor fuels tax at the distributor level before any fuels enter Indian Country. The State then pays the tribes a certain percentage of all taxes collected, reflecting the estimated exempt tribal consumption share.

6. Wisconsin. In Wisconsin, the state and the tribes have entered into cigarette tax agreements which require the tribes to collect state sales taxes on the sale or the purchase, consumption and use of cigarettes. Under this agreement, every consumer, including a tribal member, pays the state tax. Similar to the agreements in Minnesota, the State then remits to the tribe a percentage of the state tax collected which is determined on a tribal member per capita basis.

7. New York. Although not an example of a tribal-state tax agreement, I should call the Committee's attention to recent developments in the State of New York.

The State of New York adopted a precollection scheme for the taxation of gasoline, motor fuel and cigarettes which were destined for retailers in Indian country. The procedure involved collecting the tax on those products at the distribution level, from the first person who brought the taxable product into New York. This approach was upheld by the United States Supreme Court in Department of Taxation and Finance of New York v. Milhelm Attea & Bros., although the Court noted in a footnote that it was not addressing whether the precollection procedure violated treaty rights of the Seneca Nation of Indians.

Prior to implementation of this procedure, the state sought to negotiate tax agreements with the New York tribes under which the tribes would either impose their own taxes on, or establish minimum resale prices for the sale of, gasoline and cigarettes sold on their lands, and would agree to share information as to the sales and distribution of those products with the New York taxing authorities. Some tribes agreed in principle to such an arrangement; others did not. Accordingly, on April 1, 1997, the state implemented its precollection procedure. It met with widespread opposition, both from the tribes and from non-Indians living in or near Indian lands in New York. The tribes asserted that they alone had the power to regulate commerce on their territories, and that the state's precollection scheme was an improper infringement of tribal governmental power. In May, Governor Pataki agreed. He ordered that the precollection practice be stopped, directed that the regulations implementing it be revoked, and proposed legislation amending the

New York tax code so as to exempt from the New York sales and excise taxes all retail sales of gasoline, motor fuels and tobacco products that take place in Indian Country. That legislation is presently pending.

In the meantime, the New York Association of Convenience Stores, a nonprofit organization representing convenience stores that sell cigarettes, motor fuel and other products in the state of New York, has brought suit against the New York Commissioner of Taxation and Revenue to enforce the collection of state excise and sales taxes from on-reservation sales of cigarettes and motor fuel to non-Indian customers. That case is currently before the New York Court of Appeals and is to be argued later this month. The Seneca Nation has appeared in the case as amicus curiae in order to support the decision of the state not to attempt to collect the taxes at issue.

The situation in New York has a long history and feelings run deep on both sides. However, the Governor has decided that it is in the best interest of the people of New York, including but not limited to its Indian residents, that the tribes regulate retail sales of these products on their own, as they deem best, and that the state not attempt to tax those transactions.

B. State Collection Power in the Absence of an Agreement.

The existence of a tribal-state tax agreement is not a prerequisite to a state's ability to collect a lawfully imposed state tax. The Supreme Court itself, in Oklahoma Tax Commission v. Citizen Band of Potawatomi, identified a number of ways that a state can collect a lawfully imposed tax:

> "There is no doubt that sovereign immunity bars the state from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions by the state. And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."

In addition, only tribes themselves enjoy sovereign immunity, not individual tribal retail operators. Therefore, if a state and a tribe cannot reach agreement on the matter of sales and excise taxes, and the state still wants to collect any tax that it can lawfully impose, then its course is rather clear:

1. ensure that the legal incidence of the state tax falls on the ultimate consumer (in order that it can be imposed on a non-Indian retail purchaser making a purchase in Indian country), and

2. if retail operations are being conducted by the tribes themselves, as opposed to individual Indian retailers, institute a procedure to collect the tax at the importer/distributor level, under which the first person bringing the product into the state, or the manufacturer of an in-state product, collects that tax as part of the sales price to the retailer and remits it to the state on behalf of the ultimate consumer.

This may require a change in state tax law or procedure, but it is legally available, has been upheld by the Supreme Court, and does not require any federal intervention.

C. Conclusion.

The area of retail sales and excise taxes is more controversial than the area of contract, in large measure because it involves the competing power of two governments. Those two governments generally are not on the best of terms, and it is often difficult for them to sit down and try to resolve their differences in a way that meets their mutual needs and interests. However, I submit to the Committee that it is best to let this process continue to work itself out. Tribes and states are reaching workable, creative and effective solutions to this issue, solutions that meet the needs of those tribes and those states. Imposing a uniform federal rule would stop this process cold and prevent continued evolution in the tribal/state relationship that, if continued by people with good will on both sides, could well result in benefits for Indians and non-Indians alike.

III. SUMMARY

Mr. Chairman, in both of these areas—contracting and the collection of state sales taxes—tribes and their contracting parties, in the first, and tribes and states, in the second, are reaching solutions that serve their respective interests and meet their needs in their respective situations. This is a process that evolves. It evolved with the federal government, it evolved with the state and local governments, and it is evolving with the tribes. The evolution proceeds smoothly at some times, at others it moves in fits and stops, but the evolution continues. If it may seem to some that this evolution is late in coming, please recall that until recently there was little need for it to do so, because of the historically low level of economic activity in Indian Country. It is the increase in that activity that provides the impetus for tribes and non-Indians to address these issues cooperatively.

In addition, I submit that, just as there is no uniform scheme or procedure for dealing with sovereign immunity in all federal, state and local governmental contracts and no uniformity in the nature and format of state sales taxes, there is no uniform scheme or procedure that is appropriate for dealing with sovereign immunity in all tribal contracts or in tribal/state tax relationships. These matters are best dealt with by the parties directly involved, in ways that they deem best. It may sometimes take a bit of effort for those parties to reach accord, but it is better for all that they do so themselves. The result will be much more appropriate for their needs than any "solution" imposed from above.

Thank you very much, Mr. Chairman. I would be happy to respond to any questions that the Committee may have.

Attachments: Exhibit A - - Law and Order Code of the Las Vegas Tribe of Paiute Indians, Title 1 - The Tribal Court

Exhibit B - - Cow Creek Band of Umpqua Tribe of Indians, Tribal Legal Code, Title 70 - Arbitration Code

LAW AND ORDER CODE OF THE LAS VEGAS TRIBE OF PAIUTE INDIANS

Title 1 - The Tribal Court

1-10 AUTHORIZATION AND DEFINITIONS

1-10-010 Establishment of the Tribal Court - Pursuant to Article VII of the Constitution and By-laws of the Las Vegas Tribe of Paiute Indians, there is hereby established by the Las Vegas Paiute Tribal Council a Tribal Court of general jurisdiction.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-10-015 Establishment of the Tribal Commercial Court - Pursuant to Article VII of the Constitution and By-laws of the Las Vegas Tribe of Paiute Indians, there is hereby established by the Las Vegas Paiute Tribal Council, as an adjunct to the Tribal Court, a Tribal Commercial Court of limited jurisdiction which may exercise the authority of the Tribal Court only with respect to those cases referred to the jurisdiction of the Tribal Commercial Court pursuant to 1-20-060(b) of this Code.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment:

1-10-020 Definitions - The following words have the meaning given below when used in this Law and Order Code:

(a) "Clerk" means the Clerk of the Tribal Court;
(b) "Code" means the Law and Order Code of the Las Vegas Tribe of Paiute Indians;
(g) "Colony" or "Reservation" means all lands of the Las Vegas Tribe of Paiute Indians described or referenced in the Constitution and By-laws of the Las Vegas Tribe of Paiute Indians, including, but not limited to, all lands described in United States Public Law 98-203.
(c) "Juvenile Court" means the Tribal Court when exercising its jurisdiction pursuant to 1-20-050 of this Code.
(d) "Tribe" means and "Tribal" refers to the Las Vegas Tribe of Paiute Indians.
(e) "Tribal Council" means the duly elected Tribal Council of the Las Vegas Paiute Tribe.

(f) "Tribal Court" means the Tribal Court of the Las Vegas Paiute Tribe and, except as otherwise clearly indicated, all adjuncts thereto, including, but not limited to, the Tribal Commercial Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-10-030 Words and Terms: Tense, Number and Gender - In interpreting and applying the words and terms of this Code, save when otherwise fairly declared or clearly apparent for the context:

(a) Words and terms in the present tense shall include the future tense;
(b) Words and terms in any gender shall refer to all genders; and
(c) Words and terms in the singular shall include the plural, and words in the plural shall include the singular.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-20 JURISDICTION OF THE TRIBAL COURT

1-20-010 Territorial Jurisdiction of the Tribal Court - The jurisdiction of the Tribal Court shall extend to all territory within the boundaries of the Colony, including trust and non-trust land, and all roads, water and bridges, and any lands which may be added to the Colony in the future or which may otherwise become subject to the jurisdiction of the Tribe by any lawful means.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-20-020 Civil Jurisdiction -

(a) The Tribal Court shall have original jurisdiction over all civil causes of action arising from any transaction or occurrence occurring within the territorial jurisdiction of the Tribal Court, including, but not limited to:
    (1) The transaction of any business within the Reservation;
    (2) The commission of a tortious act within the Reservation;
    (3) The ownership, use, or possession of any property situated within the Reservation;

(4) Contracting to insure any person, property or risk residing or located within the Reservation; or

(5) The violation of any of the civil regulatory provisions of this Code.

(b) Personal jurisdiction shall exist over all defendants, Indians or non-Indians:

(1) Served within the Territorial Jurisdiction of the Tribal Court;

(2) Consenting to such jurisdiction; or

(3) Personally served with a summons outside the Reservation in the manner prescribed by applicable rules of procedure for the Tribal Court.

(c) The act of entry upon territory within the territorial jurisdiction of the Tribal Court, including, but not limited to, entry for the purpose of delivering goods or providing services, regardless of where any contract related to such goods or services may have been executed, shall be considered consent to the jurisdiction of the Tribal Court with respect to any action arising from or related to such entry.

(d) The Tribal Court shall have no jurisdiction in any matter in which the Tribe, any Tribal instrumentality, office, authority, or any officer of the Tribe or any officer of a Tribal instrumentality, office or authority properly asserts the defense of sovereign immunity, unless such sovereign immunity has been explicitly waived in the context of the particular case before the Tribal Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

This section 1-20-020 is intended as an express reservation by the Tribal Council of civil adjudicatory jurisdiction to the full extent allowable under Tribal and federal law.

1-20-030 Criminal Jurisdiction - The Tribal Court shall have criminal jurisdiction over all offenses enumerated in this Code, or in any code or regulation adopted, utilized or enforced by the Tribe by virtue of Tribal, federal and/or state intergovernmental agreement, statute, ordinance, resolution or other enactment, when committed within the territorial jurisdiction of the Tribal Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

This section 1-20-030 is intended as an express reservation by the Tribal Council of criminal prohibitory jurisdiction to the full extent allowable under Tribal and federal law and in recognition of the Nevada state criminal jurisdiction of Tribal law enforcement officers pursuant to N.R.S. 171.1255 and any other applicable laws of the state of Nevada.

Nothing in this section 1-20-030 shall be construed as an assumption by the Tribe of criminal prohibitory jurisdiction over non-Indians greater than the maximum possible assumption of such jurisdiction under applicable federal law.

1-20-040 Probate Jurisdiction - To the full extent permitted by federal law, the Tribal Court shall have probate jurisdiction over all real and personal property located within the territorial jurisdiction of the Tribal Court at the time of the owner's death, and the personal property, wherever located, of any person residing within the Reservation at the time of their death.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

This section 1-20-040 is intended as an express reservation by the Tribal Council of probate jurisdiction to the full extent allowable under Tribal and federal law.

1-20-050 Juvenile Jurisdiction - The Tribal Court shall have original and exclusive jurisdiction in all proceedings and matters affecting children under the age of eighteen, when such children are residing or apprehended within the territorial jurisdiction of the Tribal Court. When exercising such jurisdiction, the Tribal Court shall be known as the Juvenile Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.
This section 1-20-050 is intended as an express reservation by the Tribal Council of juvenile jurisdiction to the full extent allowable under Tribal and federal law.

1-20-060 Jurisdiction Over Certain Commercial Proceedings -

(a) Original jurisdiction in all civil proceedings of the type described in 1-20-020(a) of this Code, where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, is hereby referred to the Tribal Commercial Court. The Chief Judge of the Tribal Court may also refer jurisdiction over other civil actions to the Tribal Commercial Court on a discretionary basis or at the direction of the Tribal Council.

(b) The Tribal Court may withdraw jurisdiction referred to the Tribal Commercial Tribal Court under 1-20-060(a), in whole or in

part, on its own motion or on timely motion of any party, for cause shown.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-30 LAW TO BE APPLIED BY THE TRIBAL COURT

1-30-010 Applicable Law -

(a) The Tribal Court shall apply the provisions of this Code and any other procedural codes or rules, ordinances, resolutions or other enactments adopted by the Tribe. When appropriate, the Tribal Court shall rely on previous opinions issued by the Tribal Court, the Tribal Commercial Court or the Tribal Court of Appeals interpreting this Code or any other Tribal ordinance, resolution or enactment.

(b) In civil proceedings before the Tribal Court, as distinct from proceedings before the Tribal Commercial Court, the Tribal Court *shall* first adhere to the requirements of 1-30-010(a) and *may* then apply the substantive statutory, regulatory and common law of the United States and the state of Nevada, including, but not limited to, the Nevada Uniform Commercial Code and Nevada choice-of-law principles, but only to the extent that such Nevada substantive statutory, regulatory and common law does not conflict with this Code or any duly enacted ordinances, resolutions or other enactments of the Tribe or federal law.

(c) In proceedings before the Tribal Commercial Court, the Tribal Commercial Court *shall* first adhere to the requirements of 1-30-010(a) and *shall* then, to the maximum extent enforceable under federal law, apply the below listed provisions of the Nevada Revised Statutes (and any successor provisions), including all common law principles derived from such provisions and *may* then apply substantive statutory, regulatory and common law of the United States and the state of Nevada not below listed, but only to the extent that such Nevada substantive statutory, regulatory and common law, whether listed below or not, does not conflict with this Code or any duly enacted ordinances, resolutions or other enactments of the Tribe or federal law:

(1) N.R.S Chapters 30, 31, 32, 33, 38, 40 and 42;
(2) N.R.S. Title 4 in its entirety;
(3) N.R.S. Title 7 in its entirety;

(4) N.R.S. Title 8 in its entirety;
(5) N.R.S. Chapters 106, 107 and 108;
(6) N.R.S. Chapter 112;
(7) N.R.S. Chapter 120A;
(8) N.R.S. Title 13;
(9) N.R.S. Title 54;
(10) N.R.S. Title 55;
(11) N.R.S. Title 57; and
(12) N.R.S. Title 58.

(d) In criminal proceedings the Tribal Court shall first adhere to the requirements of 1-30-010(a) and shall then apply the substantive statutory, regulatory and common law of the United States and the state of Nevada.

(e) Upon the passage of this Code, neither Nevada law nor the provisions of 25 Code of Federal Regulations (C.F.R.), part 11, shall be applied by the Tribal Court unless such application is specifically authorized by this Code.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994; with the exception of the text of Section 1-30-010(c) which was replaced in its entirety pursuant to Tribal Council Resolution No. 95-028, dated June 27, 1995.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto. The text of Section 1-30-010(c) adopted by Tribal Council Resolution No. 94-021, dated June 21, 1994, was replaced in its entirety pursuant to Tribal Council Resolution No. 95-028, dated June 27, 1995.

1-30-020 Tribal Custom -

(a) The Tribal Court shall not apply traditional or customary law of the Las Vegas Paiute Tribe, except that the customs of marriage and of divorce shall be applied when the marriage or divorce was consummated in accordance with Tribal custom prior to the effective date of Tribal Resolution No. 7/5/77A.

(b) The Tribal Court shall not consider whether Tribal customs relating to marriage and of divorce apply in any given case unless the issue of the application of Tribal customs to such case is raised by one of the parties. It is the obligation of the party wishing to benefit by the application of this section to bring to the attention of the Tribal Court the appropriate Tribal custom and to establish that their case meets the requirements for application of the custom.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

For purposes of section 1-30-020 only, the effective date of this Code shall be deemed to be the effective date of Tribal Resolution No. 7/5/77A.

1-40 JUDGES OF THE TRIBAL COURT

1-40-010 Composition of the Tribal Court -

(a) The Tribal Court, as distinct from the Tribal Commercial Court, shall consist of one Chief Judge and as many Associate Judges as the Tribal Council shall deem necessary.

(b) The Tribal Commercial Court shall consist of one Judge.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-020 Qualifications for Tribal Court Judges - A Tribal Court judge, including the Chief Judge, may be any person, Indian or non-Indian, whether a resident or non-resident of the Reservation, provided that such person:

(a) Is twenty-five (25) years of age or older;
(b) Has never been convicted of a felony;
(c) Is not a member of the Tribal Council;
(d) Is mature, trustworthy, and of good moral character;
(e) Is capable of supervising a staff of Associate Judges, Clerks, and others;
(f) Is willing to attend training sessions for Tribal judges; and
(g) Is able to determine in what cases he will be disqualified and is willing to disqualify himself.

Preference for this position of Judge of the Tribal Court shall be given to those who are educated or experienced in the law.
Preference shall also be given to enrolled members of federally recognized Tribes, Bands or Communities of Native Americans.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-025 Additional Qualifications for Judge of the Tribal Commercial Court - The judge of the Tribal Commercial Court may be any person, Indian or non-Indian, whether a resident or non-resident of the Reservation, provided that such person:

(a) meets the requirements of 1-40-020 of this Code; and,
(b) Is duly licensed to practice law in the courts of any State within the ninth or tenth federal Judicial circuits at all times while presiding as a Judge of the Tribal Commercial Court.

Preference for the position of Judge of the Tribal Commercial Court shall be given to persons having: (i) significant prior adjudicatory experience; (ii) experience in the area of federal Indian law and/or commercial law in the State of Nevada; and (iii) five (5) or more years experience as a licensed attorney in the State of Nevada.

Preference shall also be given to enrolled members of federally recognized Tribes, Bands or Communities of Native Americans.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment:

1-40-030 Appointment of Judges -

(a) All judges of the Tribal Court shall be appointed by the Tribal Council. All judges shall be chosen from a list of qualified candidates recommended by the Law and Order Committee of the Tribal Council.

(b) Nothing in this section 1-40-030 shall prohibit the Tribal Council from contracting or agreeing with the Bureau of Indian Affairs or any other agency or organization that such agency or organization shall provide all or part of the compensation of a Tribal Court judge, and shall in return have control over the appointment of such judge. In such situations, the Tribal Council shall by resolution recommend to such agency or organization the appointment of a particular person as a Tribal Court judge.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-040 Term of Office -

(a) Unless removed for cause, the Chief Judge of the Tribal Court shall serve for a term of three years and until his successor assumes office, Associate Judges of the Tribal Court shall serve for a term of one year and until their successors assume office and the judge of the Tribal Commercial Court shall serve a term of three years and until his successor assumes office.

(b) All judges shall be eligible for reappointment.

(c) All judges shall assume office following their appointment by taking the following oath of office, administered by the Tribal Council Chairperson or his designate, at a regularly scheduled meeting of the Tribal Council: "I, _____,

do solemnly swear/affirm that I will uphold and protect the Constitution and Bylaws of the Las Vegas Paiute Tribe, that I will fairly administer justice and perform the duties of judge of the Tribal Court/Tribal Commercial Court of the Las Vegas Tribe of Paiute Indians to the best of my abilities."

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-050 Duties and Powers of Tribal Court Judges -

(a) Judges of the Tribal Court shall have the duty and power to conduct all Tribal Court proceedings, and issue all orders and papers incident thereto, in order to administer justice in all matters within the jurisdiction of the Tribal Court. In so doing they shall:
  (1) Be responsible for establishing and maintaining Rules of the Tribal Court regulating conduct in the Tribal Court and the Tribal Commercial Court. Such Rules of the Tribal Court must be approved by the Tribal Council;
  (2) Hold Tribal Court regularly at a designated time and place on the Colony;
  (3) Hear and decide all cases;
  (4) Enter all appropriate orders and judgments;
  (5) Issue all appropriate warrants;
  (6) Keep such records as are required by this Code, the Rules of the Tribal Court, Tribal ordinance, resolution or other enactment of the Tribe;
  (7) Perform the duties of the Clerk in the Clerk's absence;
  (8) Perform such other duties as are required by this Code, the Rules of the Tribal Court, Tribal ordinance, resolution or other enactment adopted by the Tribe; and
  (9) Perform such other duties as are necessary and proper for the administration of justice.

(b) Unless a coroner is appointed in accordance with the provisions of this Code, the Chief Judge shall have the authority to perform the duties of Coroner for the Tribe.

(c) The Chief Judge shall hear all cases except those: (i) which are assigned by the Chief Judge to an Associate Judge; (ii) which must be heard by an Associate Judge in order to assure the prompt administration of justice; or (iii) for which jurisdiction has been referred to the Tribal Commercial Court pursuant to 1-20-060(b) of this Code.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-055 Duties and Powers of Tribal Commercial Court Judge -

(a) The judge of the Tribal Commercial Court shall have the duty and full power of the Tribal Court to conduct all proceedings which have been referred to its jurisdiction pursuant to 1-20-060 of this Code, and to issue all orders and papers incident thereto, in order to administer justice in all matters within the jurisdiction of the Tribal Commercial Court. In so doing he shall:

(1) Hold Tribal Commercial Court on the Reservation at a location designated by the Chief Judge of the Tribal Court at such times as directed by the Chief Judge of the Tribal Court;

(2) Hear and decide all cases referred to the Tribal Commercial Court pursuant to 1-20-060 of this Code;

(3) Enter all appropriate orders and judgments in such cases;

(4) Keep such records as are required by this Code, the Rules of the Tribal Court, Tribal ordinance, resolution or other enactment adopted by the Tribe;

(5) Perform the duties of the Clerk in the Clerk's absence;

(6) Perform such other duties as are required by this Code, the Rules of the Tribal Court, Tribal ordinance, resolution or other enactment adopted by the Tribe; and

(7) Perform such other duties as are necessary and proper for the administration of justice.

(b) In addition to all standards and requirements imposed by this Code, the Rules of the Tribal Court, Tribal ordinance, resolution or other enactment adopted by the Tribe, the judge of the Tribal Commercial Court shall be bound by all judicial standards, codes of judicial conduct, and canons of judicial ethics applicable to judges presiding in Nevada courts of general jurisdiction.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment:

1-40-060 Appointment of Temporary Judges -

(a) If, due to the disqualification or other unavailability of the Chief or Associate Judges of the Tribal Court, an additional judge is needed to adjudicate matters at trial or on appeal, the Tribal Council shall have the power to appoint a temporary judge to

hear the case, or to contract with any agency or organization for such appointment.

(b) The Tribal Council must make such an appointment when it is necessary to insure the prompt administration of justice.

(c) Whenever possible, a temporary judge shall have experience as a Tribal Judge.

(d) Temporary judges must meet the requirements of 1-40-020 of this Code.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-070 Compensation of Judges -

(a) The compensation of all judges of the Tribal Court shall be set by resolution of the Tribal Council. No judge shall have his compensation reduced during his term of office.

(b) Nothing in this section shall prohibit the Tribal Council from contracting or agreeing with the Bureau of Indian Affairs or any other agency or organization that such agency or organization shall provide all or part of the compensation of a judge of the Tribal Court, and shall in return have control over the compensation of such judge. In such situations the Tribal Council shall by resolution make a recommendation to such agency or organization as to the compensation of judges of the Tribal Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-080 Removal of Judges -

(a) Judges of the Tribal Court may be removed for good cause by a two-thirds (2/3) vote of the full Tribal Council; provided, however, that no judge of the Tribal Court may be removed during the original pendency of any case.

(b) Procedures to be followed in removing a judge of the Tribal Court:

(1) No action will be taken except on a written complaint to the Tribal Council setting forth specific facts justifying removal;

(2) The judge shall be immediately notified of the charges against him;

(3) Within 60 days of receiving a complaint against any judge, the Tribal Council shall decide by majority vote of a quorum whether the complaint is frivolous and should be dismissed, or whether the complaint requires a hearing before the Tribal Council to determine if the judge should be removed. Notice of this decision must be sent by certified mail to both the judge accused and the complainant within five (5) days of the decision. No judge shall be removed except following a hearing on the complaint and a subsequent decision and resolution by the Tribal Council that removal is appropriate.

(4) If the Tribal Council decides a removal hearing is required, it shall set a date and provide notice of such hearing to the complainant and the accused judge at least thirty (30) days, but not more than sixty (60) days, in advance. Once the date for a removal hearing is set by the Tribal Council, the accused judge shall be hereby automatically suspended from his duties as a judge of the Tribal Court.

(5) At the removal hearing both the accused judge and the complainant shall be given an opportunity to present evidence, call witnesses, and make a statement to the Tribal Council in support of their contentions.

(6) After a removal hearing is held, the Tribal Council shall vote on whether or not the evidence presented establishes that good cause exists for removing the accused judge. The parties shall be notified of the Tribal Council's decision within 60 days of the hearing. Any judge not removed is restored to his duties as of the time of the decision of the Tribal Council against removal.

(c) Nothing in this section shall prohibit the Tribal Council from contracting or agreeing with the Bureau of Indian Affairs or any other agency or organization that such agency or organization shall provide all or part of the compensation of a judge of the Tribal Court, and shall in return have control over the removal of such judge. When appropriate, the Tribal Council shall by resolution recommend to the agency or organization the removal of a Tribal Judge after compliance with the procedures of this section.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-090 Disqualification of Judges; Conflict of Interest - No judge shall hear or determine any case when he has a direct interest, other than an interest arising solely on the basis of a judge's enrollment in the Tribe, in the outcome of such case or where he is related by blood or marriage to one of the parties as: husband, wife, brother, sister, father, mother, grandfather, grandmother, grandson, granddaughter, son, daughter, uncle, aunt, nephew, niece or first cousin. Any party, or the relevant judge, may raise the question of conflict of interest. Upon decision by the judge involved that disqualification is appropriate, another judge of the Tribal Court shall hear the matter. If the judge refuses to disqualify himself, such refusal may be grounds for appeal of the final decision in the case. If the Tribal Court of Appeals determines that the judge should have disqualified himself, it shall order the retrial of the matter in the Tribal Court before a different judge.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-40-100 Filling Vacancies - When a judge's position becomes vacant for any reason before the end of his term, the Tribal Council shall fill the vacancy by appointment. The judge appointed to fill a vacancy will serve the remainder of the original term and be eligible for reappointment. Any appointment under this Section shall be subject to the requirements of 1-40-060 of this Code.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-50 CLERK OF TRIBAL COURT

1-50-010 Qualifications of Clerk - The Clerk shall:

(a) Be willing to attend training sessions for Tribal Court Clerks;
(b) Be qualified to perform the duties of the clerk as set forth in 1-50-030 of this Code; and
(c) Be bondable.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-50-020 Appointment of Clerk -

(a) The Clerk shall be appointed by the Tribal Council upon the recommendation of the Law and Order Committee.

(b) Nothing in this Section shall prohibit the Tribal Council from contracting or agreeing with the Bureau of Indian Affairs or any other agency or organization that the agency shall provide all or part of the Clerk's compensation, and shall in return have control over the appointment of such Clerk.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-50-030 Duties of the Clerk -

(a) The Clerk shall keep the records of the Tribal Court and the Tribal Commercial Court, including, but not limited to, a case file with an identifying number containing all of the pleadings and all papers filed in each case.

(b) The Clerk shall post all notices required by this Code and Tribal law to be sent by the Tribal Court.

(c) The Clerk shall assist all persons or organizations with their business before the Tribal Court so as to insure the efficient operation of the Tribal Court and the Tribal Commercial Court. Such assistance may include, but is not limited to, help with the preparation of papers to be filed with the Tribal Court.

(d) The Clerk shall collect all fines paid, pay out all duly authorized fees, and account for all moneys to the Tribal Council.

(e) The Clerk shall attend all sessions of the Tribal Court and the Tribal Commercial Court to administer oaths and otherwise assist the judge in the conduct of the Tribal Court.

(f) The Clerk shall be under the supervision of the Chief Judge and shall perform such other duties with regard to the Tribal Court or the Tribal Commercial Court as the Chief Judge may direct.

(g) Nothing in this Section shall be construed to prohibit the Clerk from having other duties consistent with the office of Clerk, such as matron, bookkeeper, etc.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-50-040 Judge May Assume Duties of the Clerk - When, for whatever reason, the position of Clerk is vacant or the Clerk is unavailable, any Tribal Court judge may assume and perform the duties of the Clerk.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.

Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-50-050 Termination of a Clerk - The Clerk may be removed from office for cause by the vote of a majority of a quorum of the Tribal Council.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-60 RECORDS OF THE TRIBAL COURT

1-60-010 Tribal Court Files -

(a) Tribal Court files are generally not open to the public. Only the parties to proceedings before the Tribal Court or the Tribal Commercial Court and their designated representative(s) and/or agent(s), any judge of the Tribal Court, and the Tribal Council or its designated representative(s) and/or agent(s) may inspect the records of any proceeding before the Tribal Court or the Tribal Commercial Court and obtain copies of any documents included therein.

(b) To insure the integrity of Tribal Court records, authorized persons may inspect Tribal Court or Tribal Commercial Court files only during the ordinary working hours of the Clerk or under the supervision of any Tribal Court judge. Under no circumstances shall anyone except the judge hearing a particular case take a file from the Clerk's office without a written order from the judge.

(c) Authorized persons may obtain copies of documents contained in a Tribal Court or Tribal Commercial Court file from the Clerk for a reasonable charge to be set by the Chief Judge. The Clerk shall certify that such copies are accurate copies of the document on file with the Tribal Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-60-020 Recording Tribal Court Proceedings -

(a) When requested to do so by a party to a proceeding before the Tribal Court or the Tribal Commercial Court, the Clerk shall record the audio portion of such proceeding. Such recordings shall be identified by case number and maintained by the Clerk for one year from the date of the recording for use in appeals or

collateral proceedings in which the events of the hearing or the manner in which it was conducted are in issue.

(b) To preserve the integrity of such recordings, the Clerk shall store them in a safe place and release them only upon the order of the Chief Judge.

(c) Nothing in this section shall prohibit the Tribal Council from authorizing the archiving of recordings older than one year in the central files of the Tribe, the Bureau of Indian Affairs, or any other agency or organization.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-60-030 Forms of Decisions -

(a) Each decision of the Tribal Court, whether at trial or on appeal, shall be recorded on a form approved by the Tribal Council for such purpose. The decision form shall provide for recording the date, the case number, the parties, the substance of the complaint, a brief summary of the evidence presented and the judgment of the Tribal Court.

(b) This decision form shall be placed in the case file as an official document of the Tribal Court.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-70 RULES OF THE TRIBAL COURT

1-70-010 Preparation of Rules - The Chief Judge may prepare Rules of Court concerning conduct in the Tribal Court. Such Rules may include, but are not limited to, the time and place of Tribal Court and Tribal Commercial Court sessions, decorum in court and other matters which will make the Tribal Court function more efficiently. Such Rules shall supplement, but may not conflict with, other court procedural rules ordinances or other enactments of the Tribe.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-70-020 Approval of Rules - The Rules of Tribal Court shall be reviewed by the Tribal Council and become effective upon approval by the Tribal Council.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-70-030 Amendment of Rules - The Rules of Tribal Court may be amended upon the recommendation of the Chief Judge of the Tribal Court by a resolution of the Tribal Council. Such a resolution should specify which rules are superseded and include the text of the new rules.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-70-040 Sanctions -

(a) The Tribal Court may require observance of the Rules of Tribal Court, this Code and/or any court procedural rules adopted by the Tribe before taking any action in a case.

(b) Where any party to a case before the Tribal Court suffers actual monetary damages, including fees to a representative, due to delay in the proceedings or any other reason, because of the failure of another party in such case to obey the Rules of Tribal Court, this Code and/or any court procedural rules adopted by the Tribe, the injured party may sue to recover their actual damages.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-80 PRACTICE BEFORE THE TRIBAL COURT

1-80-010 Right to Represent Oneself or Have a Representative as Counsel -

(a) Parties to cases before the Tribal Court shall have the right to represent themselves without the assistance of counsel, unless the court in which their case is being heard determines that such parties are not competent to proceed without a representative.

(b) Parties to any case before the Tribal Court may employ a representative as counsel to help present their case.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-80-020 Who May Be a Representative -

(a) Any person may be the representative of a party to a case before the Tribal Court or the Tribal Commercial Court and may appear

on behalf of such party upon payment by each representative of a $50.00 fee to the Clerk, before each case in which such representative appears before the Tribal Court, and subscribing to the following oath: "I, _____ , do hereby (swear/affirm) that I am familiar with the Constitution and Bylaws and the Law and Order Code of the Las Vegas Paiute Tribe and that I will conduct myself with honor and integrity towards those I represent and with respect before the Tribal Court."

(b) A list of persons who have fulfilled the requirements of this section shall be kept by the Clerk.

(c) A relative or close friend of a party to any case before the Tribal Court who is not compensated for his efforts may represent such party without payment of the fee required under 1-80-020(a).

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-80-030 Representative's Right to Appear -

(a) A representative may be denied the privilege of appearing before the Tribal Court, permanently or for a stated period of time, on any of the following grounds:
  (1) Swearing in Tribal Court to facts known to him to be false; or
  (2) Conviction in any court of any offense within a year of the representatives appearance before the Tribal Court.

(b) No representative may be denied the privilege of appearing before the Tribal Court under 1-80-030(a) of this Code without a hearing before the Chief Judge of Tribal Court in which the necessary charges must be proven by a preponderance of the evidence.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-90 TRIBAL COURT APPEALS

1-90-010 Composition of the Tribal Court of Appeals -

(a) The Tribal Court of Appeals shall consist of a panel of all the judges of Tribal Court except the judge from whose decision the appeal is taken. Such panel shall be composed of at least three (3) judges of the Tribal Court.

(b) When necessary, the Tribal Council shall appoint temporary judges to sit on the Tribal Court of Appeals. Whenever possible

such temporary judges shall have experience as Tribal Court Judges.

(c) Nothing in this section shall prevent the Tribal Council from entering into an agreement with other Tribes, reservations and colonies of Nevada Indians whereby Tribal Court judges are shared between the various Tribal Courts for the purpose of hearing appeals. Any such agreement by Tribal Council shall take precedence over the general provisions contained in 1-90-010(a) and 1-90-010(b).

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

1-90-020 Appeal Procedure -

(a) Any party dissatisfied with a decision of the Tribal Court, except the prosecution in a criminal case, may appeal by filing a written notice of appeal with the Clerk within thirty (30) days of the judge's decision. Where a decision is not delivered at a hearing with both parties present, the thirty (30) days does not begin to run until the party who wishes to appeal receives formal notice of the decision.

(b) Upon receiving the notice of appeal, the Clerk shall create an appellate case file and transfer the entire record, including any notation indicating the existence of a recording of the proceedings, to the Tribal Court of Appeals.

(c) Whenever possible, appeals shall be decided on the record of the case, including the decision form and any recording of the proceedings, in order to eliminate unnecessary travel and delay. The Tribal Court of Appeals may require a hearing or oral argument if it considers that such would be necessary or helpful.

(d) After the decision by the Tribal Court of Appeals, one judge thereof shall fill out a decision form stating the result and reason for the result on appeal. A copy of the completed decision form shall be sent to each party to the appeal by certified mail. The original form of decision shall be filed in the appellate case file and remain a part of the record of the case in any further proceedings.

Source: Tribal Council Resolution No. 94-021, dated June 21, 1994.
Comment: This section entirely restates and supersedes its prior version as originally adopted pursuant to Tribal Resolution No. 7/5/77A and all amendments thereto.

EXHIBIT B
to
March 11, 1998 Testimony of Mark A. Jarboe, Dorsey & Whitney LLP

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS

TRIBAL LEGAL CODE

TITLE 70
ARBITRATION CODE

70-10 Authorization and Repeal of Inconsistent Legislation.

The Cow Creek Band of Umpqua Tribe of Indians (the "Tribe") is organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) and the provisions of the Cow Creek Band of Umpqua Tribe of Indians Recognition Act of December 29, 1982 (P.L. 97-391), as amended by the Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgement Funds Act of October 26, 1987 (P.L. 100-139), and the Cow Creek Tribal Constitution, duly adopted pursuant to a federally-supervised constitutional ballot, on July 8, 1991 (the "Tribal Constitution").

Pursuant to Article III, Section 1 of the Tribal Constitution, the Cow Creek Tribal Board of Directors (the "Board") is the governing body of the Tribe. Pursuant to Article VII, Section I(d) of the Tribal Constitution, the Board has the authority to "administer the affairs and assets of the Tribe . . ." Pursuant to Article VII, Section I(e) of the Tribal Constitution, the Board has the authority to "administer . . . all federal funds . . . and . . . all funds from tribal business enterprises . . ." Pursuant to Article VII, Section I(g) of the Tribal Constitution, the Board has the authority to "[t]o manage all economic affairs and enterprises of the Tribe . . ." Pursuant to Article VII, Section I(i) of the Tribal Constitution, the Board has the power to "enact ordinances and laws governing the conduct of all persons on tribally-owned land; to maintain order and protect the safety, health, and welfare of all persons within the jurisdiction of the Tribe; and to enact any ordinances or laws necessary to govern the administration of justice, and the enforcement of all laws, ordinances or regulations . . ." Pursuant to Article VII, Section I(i) of the Tribal Constitution, the Board has the power to "enter into loan agreements, joint venture business partnerships, to assign business or other income as collateral for loans, and to enter into other financial arrangements as required for the development and management of business

enterprises or land acquisition, including the enactment of such ordinances as are necessary or appropriate." Pursuant to Article VII, Section I(t) of the Tribe's Constitution, the Board has "such other powers and authority necessary to meet its obligations, responsibilities, objectives, and purposes as the governing body of the Tribe."

Pursuant to the foregoing and the Tribe's retention of the full spectrum of sovereign powers, the Board has the authority to establish, and the Board desires to establish, this Title 70 of the Cow Creek Tribal Legal Code, Arbitration Code (this "Arbitration Code").

Any prior Tribal regulations, resolutions, orders, motions, legislation, codes or other Tribal laws which are inconsistent with the purpose and procedures established by this Arbitration Code are hereby repealed to the extent of any such inconsistency.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-20 Scope of Ordinance.

This Arbitration Code applies to any written contract, agreement or other instrument entered into by the Tribe, or any other person or entity entering into a transaction subject to the jurisdiction of the Tribe, in which the parties thereto expressly agree to settle by arbitration any controversy arising out of such contract, agreement or other instrument and in which this Arbitration Code is expressly and specifically invoked and where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-30 Agreements to Arbitrate are Enforceable.

An express agreement in any written contract, agreement or other instrument described in Section 70-20, above, to settle by arbitration any controversy thereafter arising out of such contract, agreement or other instrument or any other transaction contemplated thereunder, including the failure or refusal to perform the whole or any part thereof, or a written agreement between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement, shall be valid, irrevocable and enforceable.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-40 Law to be Applied.

a. In any contract, agreement or instrument described in Section 70-20, above, the parties may agree upon the jurisdiction whose substantive law shall govern the interpretation and enforcement of the contract, agreement, instrument or controversy. Such governing law shall be valid and enforceable, and not subject to revocation by one party without the consent of the other party or parties hereto, provided that the subject matter of the contract, agreement, instrument or controversy, and at least one of the parties thereto, shall have some contact with the jurisdiction so selected.

b. In any proceeding under this Arbitration Code, whenever the contract, agreement or other instrument sets forth a governing law provision, the Tribal Court shall apply the procedural rules of the Tribal Court and the substantive law of the jurisdiction selected in such governing law provision; provided that no procedural rule of the Tribal Court shall be effective to bar, delay or impair any action, proceeding or remedy where such action, proceeding or remedy would not be barred, delayed or impaired by the procedural rules of the courts of the jurisdiction whose substantive law applies.

c. In any proceeding under this Arbitration Code, whenever the contract, agreement or other instrument does not set forth a governing law provision, the Tribal Court shall first apply Tribal law and applicable federal law and then apply substantive statutory, regulatory and common law of the jurisdiction selected in such governing law provision, but only to the extent that any such substantive statutory, regulatory or common law does not conflict with this Arbitration Code or other applicable Tribal law.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-50 Stay of Proceedings and Order to Proceed with Arbitration.

a. If any action for legal or equitable relief or other proceeding is brought by any party to any contract, agreement or instrument described in Section 70-20, above, the Tribal Court Judge presiding over the pending action or proceeding shall not review the merits of the pending action or proceeding, but shall stay the action or proceeding until an arbitration has been had in compliance with the agreement.

b. A party to any contract, agreement or instrument described in Section 70-20, above, claiming the neglect or refusal of another party thereto to proceed with an arbitration thereunder may make application to the Tribal Court for an order directing the parties to proceed with the arbitration in compliance with their

agreement. In such event, the Tribal Court shall order the parties to submit to arbitration in accordance with the provisions of the contract, agreement or instrument and the question of whether an obligation to arbitrate the dispute at issue exists shall be decided by the arbitrator(s).

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-60 Advice of the Court.

At any time during an arbitration, upon request of all the parties to the arbitration, the arbitrator(s) may make application to the Tribal Court for advice on any question of Tribal or other applicable law arising in the course of the arbitration. The advice of the Court upon such application shall be final as to the question presented and it shall bind the arbitrator(s) in rendering any award.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-70 Time Within Which Award Shall be Rendered.

a. If the time within which an award is rendered has not been fixed in the arbitration agreement, the arbitrator(s) shall render the award within thirty days from the date the arbitration has been completed. The parties may expressly agree to extend the time in which the award may be made by an extension or ratification thereof in writing.

b. An arbitration award shall be in writing and signed by the arbitrator(s). The arbitrator(s) shall provide written notice of the award to each party by certified or registered mail, return receipt requested.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-80 Application for Order Confirming Award; Record to be Filed with Clerk of Court; Effect and Enforcement of Judgment.

a. At any time within one year after an arbitration award has been rendered and the parties thereto notified thereof, any party to the arbitration may make application to the Tribal Court for an order confirming the award.

b. Any party applying for an order confirming an arbitration award shall, at the time the order is filed with the Clerk of the Tribal Court for entry of judgment thereon, file the following papers with the Clerk: (1) the agreement to arbitrate; (2)

the selection or appointment, if any, of the arbitrator(s); (3) any written agreement requiring the reference of any question as provided in Section 70-50, above; (4) each written extension of the time, if any, within which to make the award; (5) the award; (6) each notice and other paper used upon an application to confirm; and (7) a copy of each order of the Tribal Court upon such an application.

c. An arbitration award shall not be subject to review or modification by the Tribal Court, but shall be confirmed strictly as provided by the arbitrator(s). The judgment confirming an award shall be docketed as if it were rendered in a civil action. The judgment so entered shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to, a judgment in a civil action, and it may be enforced as if it has been rendered in a civil action in the Tribal Court. When the award requires the performance of any other act than payment of money, the Tribal Court may direct the enforcement thereon in the manner provided by law.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-90 Arbitration Award Not Appealable.

Notwithstanding any other provision of the Tribal Legal Code, including without limitation, the Tribal Court Code, no further appeal may be taken from an order issued by the Tribal Court pursuant to this Arbitration Code enforcing an agreement to arbitrate or an award issued by an arbitrator.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-100 Jurisdiction of the Tribal Court in Actions to which the Tribe is a Party.

a. The Tribal Commercial Court shall have exclusive Tribal Court jurisdiction over any action to enforce an agreement to arbitrate, to compel arbitration pursuant to such an agreement to arbitrate and to enforce an award made by an arbitrator pursuant to such an agreement to arbitrate, contained in any contract, agreement or other instrument described in Section 70-20, above, to which the Tribe is a party; provided that the Tribal Board of Directors has explicitly waived the defense of tribal sovereign immunity in the contract, agreement or other instrument at issue.

b. The jurisdiction of the Tribal Commercial Court under this Arbitration Code shall be concurrent with the jurisdiction of any court of competent jurisdiction to the jurisdiction of which the Tribal Board of Directors may have explicitly

consented in such contract, agreement or other instrument. Any consent to the jurisdiction of any court of competent jurisdiction contained in a contract, agreement or other instrument described in Section 70-20, above, to which the Tribe is a party shall be valid and enforceable in accordance with its terms.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-110 Severability.

If any section, or any part thereof, of this Arbitration Code or the application thereof to any party, person or entity in any circumstances shall be held invalid for any reason whatsoever by a court of competent jurisdiction or by federal legislative enactment, the remainder of the relevant section or part of this Arbitration Code shall not be affected thereby and shall remain in full force and effect as though no section or part thereof has been declared to be invalid.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-120 No Waiver of Sovereign Immunity.

Nothing in this Arbitration Code shall provide or be interpreted to provide a waiver of the sovereign immunity of the Tribe or any of its governmental officers, employees and/or agents acting within the scope of their authority.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-130 Amendment or Repeal of Arbitration Code.

After this Arbitration Code becomes effective pursuant to Section 100-140, below, this Arbitration Code shall not be amended or repealed other than by passage of a Resolution approved by unanimous vote of the entire Tribal Board of Directors. This Arbitration Code shall not be amended to adversely impair the rights of any party to any contract, agreement or other instrument described in Section 70-20, above.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

70-140 Effective Date.

This Arbitration Code shall be effective upon adoption hereof by Resolution approved by no less than eight (8) members of the Tribal Board of Directors by roll call vote.

Source: Tribal Board of Directors Resolution No. 96-26, dated March 10, 1996.

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April 10, 1998

The Honorable Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Re: March 11, 1998 Oversight Hearing on Tribal Sovereign Immunity
Responses to Supplemental Questions

Dear Senator Campbell:

In your letter of March 23, 1998, you posed six supplemental questions to me and asked for my responses. I have repeated the questions below, followed, in each case, by my response.

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1. How is tribal immunity "an issue" but not "an obstacle" in contracts with tribes?

Tribal sovereign immunity is "an issue" in contracts with tribes in that it is one of the matters that must be addressed in contract negotiations, in the same manner as price, nature of the contractual obligations, time of performance, remedies upon breach and other contractual concerns. It is no more of "an obstacle" to a contract than any other contractual issue that must be addressed and agreed to by the parties.

For example, if I propose to sell a fire truck to a tribe, there are a number of issues that I should address in my contract. Some apply to my obligations and the tribe's rights: What kind of fire truck must I deliver? What kind of performance

specifications must it meet? When and where do I have to deliver it? What kind of equipment is to come with it? What color is it to be painted? What warranties do I provide? Some apply to the tribe's obligations and my rights: How much does the tribe have to pay for the truck? When do they have to pay for it? And some apply mutually or even to the contract itself: What rights do the parties have to assign the contract to others? What is the governing law of the contract? What is the forum for resolving disputes?

The issue of the tribe's sovereign immunity is an issue that should be addressed as part of the "tribe's obligations and my rights" discussion. Because the tribe has sovereign immunity, if it does not pay for the truck after I deliver it I would be unable to sue the tribe to collect the amount owed to me in the event of nonpayment. Therefore, if I want to be able to sue the tribe, it would be important for me to ensure that the contract addresses this point in a way that meets my satisfaction. In much the same fashion, if the tribe wants the fire truck delivered within the next month rather than at the end of the year, or wants a truck that will pump 1,000 gallons of water per minute rather than 500, the tribe should ensure that the contract addresses the time of delivery, or the pumping capacity of the truck, in a way that meets its satisfaction. We do not consider time of delivery, or the level of performance of a product, as an "obstacle" to entering into a successful contract for its purchase and sale, yet these issues must be addressed to the satisfaction of both parties or there will be no contract, just as the issue of the tribe's immunity must be satisfactorily addressed.

2. What are the consequences to the tribe if it refuses to waive its immunity?

There is no single answer to this question. The possibilities include at least the following:

a. There may be no contract. If the nature of the transaction is one where (i) the non-tribal party performs first, (ii) the non-tribal party is unable to sue the tribe if it fails to perform and (iii) the adverse effect of non-performance by the tribe would be significant in comparison to the anticipated gain by the non-tribal party under the contract, then the non-tribal party may well decide not to participate. The best example of this would be a bank loan. It is hard to conceive of a bank lending money to a tribe without a means of enforcing the tribe's obligation to repay in the event that the tribe refused to do so.

b. The contract may proceed with the tribe performing its side of the bargain first. In that case, the non-tribal party is not at risk of it performing first and the tribe defaulting later. Examples of such contracts would be a contract where the tribe is selling goods, delivers them to the buyer and the buyer pays upon or after delivery, or a contract where the tribe pays or deposits the purchase or contract price up front and the non-tribal party then performs. One tribe for whom we work contracted for the construction of an $8,000,000 building by paying the entire contract price to the construction contractor up front. Because the contractor was fully paid, it had no risk of nonpayment and would not need to sue the tribe to enforce payment. (In addition, by prepaying the contract price the tribe was able to obtain a discount from the contractor in an amount equal to the present value of the early payment when compared to payments stretched out over the construction period.)

c. The parties may proceed without any waiver of immunity and with no early performance by the tribe. This would happen most often in situations where the adverse effect on the non-tribal party of a failure by the tribe to perform is small in comparison to the overall gain anticipated to be made by the non-tribal party under the contract. For example, one tribe for whom we work had contracted for weekly deliveries of potato chips to its casino. After the deliveries had been going on for almost a year, the lawyer for the potato chip vendor called me to say that his client had realized that there was no waiver of sovereign immunity in the potato chip sales contract and that the vendor wanted to have the tribe grant such a waiver. I asked if his client had ever had any trouble in collecting payment and he replied "no." After consulting with the tribe, I called the attorney for the vendor and said to him: "The tribe will not waive its sovereign immunity in order to buy potato chips. There are lots of potato chip companies out there. If your client wants to deliver potato chips, the tribe will pay for potato chips and if it ever doesn't pay, your client can stop delivery. If that's not satisfactory, let me know and the tribe will buy its potato chips elsewhere." The vendor apparently decided that the profitability from selling potato chips to the tribe more than outweighed the potential loss it would suffer if the tribe didn't pay for a shipment, as the deliveries never slowed down.

3. Is tribal immunity the "last vestige" of governmental immunity in the United States?

No. The federal government, the state governments, and most local governments retain sovereign immunity and assert it regularly. There are limited waivers that the federal and most state and local governments have granted (just as tribal governments have granted limited waivers), but the scope of those waivers vary between the federal and state governments and vary from state to state. Mr. Reid Chambers, in his testimony before the Committee on March 11, 1998, summarized many of those limitations on state waivers (pp. 4-8). And as recently as last month, the Supreme Court has ruled that members of local legislative bodies are immune from suit under the federal civil rights laws (42 U.S.C. § 1983) for their actions taken in their legislative capacity (Bogan v. Scott-Harris, No. 96-1569; March 3, 1998). 1/

While contract, tort and civil rights claims are all different, the federal, state and local governments continue to enjoy immunity on many levels and against many types of claims. No government's immunity has been waived entirely, and tribal sovereign immunity is clearly not an anomaly in our federal system.

4. If Congress were to allow contract and/or tort suits against Indian tribes, should claimants be required to exhaust tribal administrative and/or judicial remedies before bringing suit?

This question goes to the legitimacy of tribal courts in the federal system. It also exposes the misunderstanding that many non-Indians have about tribal courts, by setting up a false dichotomy: "exhaust tribal ... remedies" vs. "bringing suit."

Many, if not most, tribes have tribal courts which have jurisdiction over contract and tort claims (subject, in the case of suits against the tribes themselves, to tribal immunity). If tribal immunity were to be waived, then an action in tribal

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1/ The Court stated: "Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason. ... The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."

court on a contract or tort matter would be just as much "bringing suit" as an action in a federal or state court.

Furthermore, under the "abstention" rule of the Supreme Court's National Farmers Union and Iowa Mutual decisions, a federal court with jurisdiction over an action must abstain in favor of the action proceeding in tribal court if a tribal court has a colorable claim of jurisdiction. After the tribal process is "exhausted," the plaintiff can come to the federal court to ask only one question: "Did the tribal court properly assert jurisdiction over the matter?" If the answer to that question is "yes," then the action is over; the tribal court's resolution of the case is final. If the answer is "no," then the action can proceed anew in federal court, for the tribal court did not have jurisdiction to decide the matter. However, other than in a case of the absence of jurisdiction in the tribal court, a plaintiff does not get a "second bite at the apple" in federal court.

Given the foregoing, I submit that the question would more properly be asked as follows: "If Congress were to allow contract and/or tort suits against Indian tribes, should claimants be required to bring those suits in tribal court or be allowed to bring them in federal or state court?" There appear to be three possibilities:

a. Claimants could bring such actions in federal 2/ or state courts. The effect of this choice would be to eliminate any role for tribal law and tribal courts in contract or tort actions, because non-Indian claimants would invariably choose the non-tribal forum in which to bring their claims. This would remove one of the essential attributes of governmental power—the power to establish laws and tribunals for the resolution of disputes—from the tribes.

b. Claimants must first bring suit in tribal courts, but after the action is completed in tribal court the claimants could bring an action de novo in federal or state courts. This would make the tribal action meaningless, would be highly inefficient and would waste the time of the parties and the tribal court. It would have the same effect on the

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2/ There is a serious question whether federal courts would have subject matter jurisdiction over tort or contract suits against Indian tribal governments under Article III, Section 2, Clause 1 of the Constitution.

role and responsibility of the tribal courts as the preceding choice, only at a greater cost.

c. Claimants must bring suit in tribal court and could bring an action in federal or state court only if the tribal court lacked jurisdiction. This would correspond closely to the present rule governing suits under the Indian Civil Rights Act and would codify the rule that applies in the federal system generally under National Farmers Union and Iowa Mutual. It would promote the use and development of tribal courts and lead to a strengthening of the tribal court system in general. It would also promote the efficient use of federal (and state) judicial resources, as more than one federal court has noted when applying the National Farmers Union and Iowa Mutual principles in the federal context.

If Congress were to waive the sovereign immunity of tribes for contract or tort matters (an action that I do not believe should be taken), then I would suggest that the third option—suit must be brought in tribal court—be chosen.

5. **Should contract damages against tribes be limited to liquidated damages on the face of the contract? Should any waivers of immunity by a tribe be interpreted as narrowly as possible, like waivers of Federal or state immunity?**

"Liquidated" damages are amounts agreed to by the parties, in a contract itself, as the appropriate measure of damage for a breach in a situation where actual damages would be difficult or impossible to measure. Many contracts do not provide for liquidated damages. Where they do, the contractual agreement of the parties should be enforced.

In a contract that did not provide for liquidated damages, I suggest that, unless a contract explicitly provided otherwise, damages for breach should be limited to compensatory damages (such amount as will make good the loss directly caused by the breach), and not for consequential (loss not directly caused by the breach but only from some consequences of the breach), punitive (damages to punish the defendant for its evil behavior) or exemplary (damages to compensate the plaintiff for mental anguish or other aggravations resulting from the breach) damages. A tribe is a government and its money and property are held for the public purpose of serving its members and others within its territory. Permitting claims on the tribal treasury

in an amount in excess of the actual damages sustained by a successful claimant would divert funds from public purposes for private benefit. That is why the federal government and most state governments have limited any waivers of their immunity to actual damages and have prohibited awards of punitive or similar damages against them. Tribal governments should be treated similarly.

For the same reasons, any waiver of immunity by a tribe should be interpreted as narrowly as possible.

6. **Are you concerned that allowing equitable claims against tribal officials in state courts could lead to problems in the enforcement of state court orders? Should state officers be authorized to enforce civil court orders on Indian reservations?**

The answer to this question flows from the answer to Question 4. If a court, whether federal, state or tribal, is to be granted subject matter jurisdiction to hear and decide an action, then it must have the authority to enforce its judgments. If a state court is to have jurisdiction over actions against tribes, then there are three possibilities:

a. Permit state officers, acting under state court order, to enforce those orders, to enter reservations and to execute against tribal assets. This would effectively eliminate the sovereign status of the tribes and their reservations vis-a-vis the states, by giving states authority to enter upon and seize tribal property.

b. Provide that state court orders could be executed by federal officers acting under a federal court order. A successful claimant would then take a state court order to a federal court and request a federal court order directing a federal marshal to enforce it.

c. Provide that state court orders shall be given full force and effect in tribal courts. A state court order could then be enforced by tribal enforcement officers acting under a tribal court order. This would be similar to the situation where a successful plaintiff obtains a judgement in one state and seeks to have it enforced in another. If I prevail against a Wisconsin defendant in a Minnesota court, I cannot have a Minnesota sheriff go into Wisconsin to seize the defendant's property; I have to take my judgment to a Wisconsin court, have it

entered there and have the Wisconsin court issue an order for a Wisconsin sheriff to execute. The same could be done with the enforcement of state court orders within reservations. (If this approach were to be adopted, then it would make sense to provide that tribal court orders are to be given full faith and credit in state and federal courts. This would give equal treatment to both court systems.)

I would not recommend that state officials be given the power to enter onto tribal lands and execute against tribal assets. The second approach would create a significant burden on the federal judiciary, would waste judicial resources, and would raise Constitutional concerns; I would not advise adopting it. If this question is reached, I would recommend the third alternative.

In any case, under any of these alternatives issues specific to Indian country would arise:

i. Most tribal land is held in trust by the United States. As such, it is immune from lien or execution. I assume that that immunity would continue.

ii. Much of the income, and assets, of many tribes consists of money received as federal payments under specific federal programs: Indian Health Service, BIA education programs, highway improvement funds, 638 contracts, etc. These payments are dedicated to the federal purpose for which they are made. Permitting execution against any of those revenues or assets would divert federal funds to other uses and frustrate federal purposes; I assume that result would not be permitted.

****

I hope that the foregoing is responsive to your request. Thank you very much for the opportunity to share my views with you and the Committee on these matters.

Yours very truly,

Mark A. Jarboe

MAJ/stl

TESTIMONY OF JOHN LATTAUZIO

PRESIDENT, J & J MINI MARKETS

ON BEHALF OF THE

NATIONAL ASSOCIATION OF CONVENIENCE STORES

AND THE

PETROLEUM MARKETERS ASSOCIATION OF AMERICA

BEFORE THE

SENATE INDIAN AFFAIRS COMMITTEE

HEARING ON NATIVE AMERICAN SOVEREIGN IMMUNITY

March 11, 1998

Introduction

Good morning, Mr. Chairman. My name is John Lattauzio. I am President of J & J Mini Markets of Alamogordo, New Mexico. J & J operates six convenience stores with motor fuels operations in southern New Mexico.

I am appearing today in my capacity as a member of the board of the National Association of Convenience Stores ("NACS") and as a member of the Petroleum Marketers Association of America ("PMAA"). NACS is a trade association of over 2,300 companies that operate over 60,000 convenience stores nationwide with some 750,000 employees. Over 75 percent of NACS member companies are classified as small businesses. NACS member companies collectively sell over 55 percent of all gasoline marketed in the United States every year.

I also am privileged to serve on the board of the New Mexico Petroleum Marketers Association ("NMPMA"). NMPMA is a state affiliate of PMAA. PMAA is a federation of state and regional petroleum marketing associations, representing nearly 11,000 independent petroleum marketers nationwide. The average member represented by PMAA sells less than 10 million gallons of motor fuel per year. Collectively, those marketers sell approximately 50 percent of

the gasoline, 75 percent of the home heating oil, and 60 of the diesel fuel sold in this country each year. Virtually all independent petroleum marketers are small, often family-owned businesses.

As an initial matter, Mr. Chairman, I would like to thank you for calling this hearing today. For years, NACS, PMAA, and other petroleum marketing organizations have called for congressional attention to the issue of state tax evasion by Native American tribes and Native American corporations. We welcome this hearing on this important issue, and thank the Committee for allowing us the opportunity to express our concerns.

Primary Focus of Testimony

Second, I want to be crystal clear regarding the issue under discussion in my testimony. NACS and PMAA do not advocate, and have not advocated, permitting states to tax Native American tribes, tribal corporations, or tribal members. Instead, NACS and PMAA advocate that states receive an express authorization from Congress to enforce U.S. Supreme Court decisions that Native American tribes and tribal corporations must collect and remit state excise taxes imposed on non-Native Americans when these non-Native Americans purchase commodities such as motor fuels and tobacco products from Native American tribes or tribal corporations.

This issue is fairly easy to understand. When a non-Native American customer buys ten gallons of gasoline from one of my stores in New Mexico, I am required by the state to add 17 cents per gallon to the cost to the customer in state gasoline excise taxes. If, on the other hand, a tribal member buys that same ten gallons of gasoline from a tribe-owned convenience store, the Supreme Court has stated that the state gasoline excise tax may not be imposed. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 96 S.Ct. 1634 (1976) ("Moe"); New York Dept. of Taxation & Finance v. Milhelm Attea & Bros., 114 S.Ct. 2028 (1994) ("Attea"); Oklahoma Tax Com'n v. Chickasaw Nation, 115 S.Ct. 2214 (1995)("Chickasaw"). These two fact patterns are not in dispute.

Under a third scenario, however, the Supreme Court has stated that if a non-Native American buys ten gallons of gasoline from the tribe-owned convenience store, then the state gasoline excise tax is to be imposed on the non-Native American and the tribe has an obligation to assist the state by collecting and remitting the tax to the state. See Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160-61, 100 S.Ct. 2069, 2084-85 (1980)("Colville"); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of

Oklahoma, 111 S.Ct. 905 (1991)("Potawatomi"). ". . . Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians." Potawatomi at 911. It is this third scenario that is at issue here today.

We are not talking about taxing Native Americans. We are talking about taxing non-Native Americans and the responsibilities the Supreme Court has stated that tribes have to assist the states in collecting these excise taxes from non-Native Americans.

The Court, in a series of decisions stretching back three decades, has examined the issue of Native American state excise tax evasion closely and issued an invitation for Congress to address this problem. First, the Court has settled the question as to whether Native American tribes must collect and remit state excise taxes on motor fuels and tobacco products imposed on non-Native Americans when it is a Native American tribe or tribal corporation that sells these products to non-Native Americans. The Court has held that tribes have the obligation to assist the states by collecting and remitting these taxes on non-Native Americans. Attea at 2035-36; Moe 1638.

Second, due to the doctrine of tribal sovereign immunity, the Court has stated that states generally cannot enforce this obligation on Native American tribes. Potawatomi at 905. In other words, the states have a right to require the assistance of the tribe, but does not have a method for enforcing this right.

Third, the Court has stated that only Congress has the authority under the Constitution to correct this legal inconsistency. Potawatomi at 912. Thus, if Native American excise state tax evasion is to be curbed, it is up to Congress to act.

Congress Must Act

This is the reason for my appearance before you today. NACS and PMAA respectfully urge this Committee to consider and adopt legislation to give states the right to enforce the tribes' obligation to collect and remit lawfully-imposed state excise taxes on sales to non-Native Americans by Native American retailers. According to the Supreme Court, only Congress has the authority to grant this relief.

My home state of New Mexico currently is grappling with this legal disconnect. Truck stops, convenience stores, and smoke shops operated by Native American tribes will be evading

approximately $14 million in state excise taxes on motor fuels and tobacco by the end of this year. These tribes are not paying to the state either the 17 cents per gallon state excise tax on gasoline or the state's 32 cents per pack excise tax on cigarettes when they sell these products to non-Native Americans.

As a direct result, New Mexico's tax base is diminished at a time of record demands on the state government. In addition, motor fuels and tobacco retailers such as myself and other New Mexico marketers find it impossible to compete against a group with such a cost advantage -- a cost advantage achieved only through tax evasion.

New Mexico is not alone in facing this problem. To varying degrees, the following states are grappling with motor fuels or tobacco excise tax evasion by Native American tribes: New York, Michigan, Oklahoma, North Dakota, South Dakota, Arizona, California, and Washington. Together, it has been estimated that states are losing over $500 million annually in tax revenues from Native American excise tax evasion.

NACS and PMAA Support Section 3 of S. 1691

NACS and PMAA support the approach taken by Senator Gorton in Section 3 of S. 1691 to address this issue. Simply stated, this section of Senator Gorton's legislation would give a state the express right to sue a tribe in federal court to collect lawfully-imposed state excise taxes imposed on sales to non-Native Americans. My company, and other private parties, would not be permitted a cause of action under Section 3. Only a state could bring such a suit against a Native American tribe. Thus, any argument that this section would subject tribes to scores of frivolous lawsuits simply is not supportable.

This section also would require a tribe to waive its tribal sovereign immunity only to the extent necessary for a state to enforce the obligations imposed by this section. Section 3 would not require a blanket waiver of sovereign immunity. Instead, it would simply stop a tribe from hiding behind a legal "loophole" to escape the obligation the Supreme Court has sanctioned.

It is important to me and to NACS and PMAA that our support for Section 3 is not mischaracterized. NACS and PMAA are not seeking to vilify all Native Americans or even those Native American retailers that are evading these taxes. Given the opportunity, I am sure that I and the other members of NACS and PMAA would take advantage of a "loophole" that would

allow us to avoid paying state or federal taxes. That would not make us bad people -- that would make us business people.

NACS and PMAA support the economic development and success of Native American tribes and corporation and would welcome the opportunity to assist these tribes and corporations in achieving this success. But even the Supreme Court has stated that the sale of a tribe's general exemption from state taxation to persons not entitled to that exemption is not economic development.

Analysis of Section 3 of S. 1691

Creation of an Affirmative Obligation Under Federal Law

The first paragraph of Section 3 imposes an affirmative obligation, under federal law, on tribes, tribal corporations, and members of a tribe to collect and remit to a state lawfully-imposed, nondiscriminatory state excise, use, and sales taxes on purchases by non-tribal members by a tribe, a tribal corporation, or a tribal member. Paragraph (1) codifies the U.S. Supreme Court's decision in Moe and Colville.

The Necessity of Creating Such An Affirmative Federal Obligation

To gain access to the federal court system to bring a suit to enforce the collection of state taxes, a state must assert a "federal question" under 28 U.S.C. § 1331. A "federal question" action is described by the Court as follows:

> "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."
>
> Louisville & Nashville Railroad v. Motley, 211 U.S. 149, 153 (1908).

To bring a suit against a tribe, tribal corporation, or tribal member for failure to collect and remit state taxes, a state must invoke the protection of a particular federal statutory, constitutional, or treaty provision either authorizing it to collect taxes or requiring the tribe, tribal corporation, or tribal member to pay such taxes. Therefore, paragraph (1) of Section 3 provides such a federal statutory provision.

Limiting the State Taxes Covered

Paragraph (1) of Section 3 only creates an obligation on Native Americans if the incidence of the state tax is on the non-Native American consumer, as required by the Supreme Court. The Court has stated that states may not impose taxes on Native American tribes selling to members of their own tribes. Chickasaw at 2214. Therefore, only those taxes imposed by the state on sales to non-Native Americans by Native American tribes, tribal corporations, or individual tribal members are subject to the obligation of paragraph (1). A state tax whose incidence is on Native American wholesalers or retailers may not be enforced under the provisions of paragraph (1) of Section 3.

Affirmative Grant Of Jurisdiction To Federal Courts

Paragraph (2) of Section 3 affirmatively grants a state the authority to bring an action to enforce paragraph (1) in a federal district court. While it can be argued that this authority is inferred by paragraph (1) and 28 U.S.C. § 1331, the authority is stated expressly in this paragraph to avoid any ambiguity.

Prohibition On Sovereign Immunity Defense

The Court has held consistently that if tribal sovereign immunity is to be limited by Congress, the federal statute must do so expressly and unambiguously.

> "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. . . Congress has always been at liberty to dispense with such tribal immunity or to limit it."
>
> Potawatomi at 909.
>
> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit. . . It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978)(internal quotations and citations omitted).

Thus, paragraph (3) of the Section 3 of S. 1691 provides an express limited waiver of tribal sovereign immunity only to the extent necessary to enforce the obligation imposed in paragraph (1).

Lack Of Geographic Limitation To Language

The Native American state excise tax evasion issue addressed by Section 3 of S. 1691 generally occurs at one of two geographic locations: (1) on an Indian "reservation;" or, (2) on Indian trust land under the superintendence of the federal government. Tribes, tribal corporations, and tribal members generally do not attempt to evade state taxes on land other than reservation or trust lands, because "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero-Apache v. Jones, 411 U.S. 145, 148-149 (1973).

Section 3 does not restrict the authority of a state to bring an action against a tribe, tribal corporation, or tribal member for tax evasion only to evasion occurring on a reservation or trust land. Instead, it codifies the Jones decision, stating that evasion of lawfully-imposed, nondiscriminatory state sales, use, or excise taxes by a tribe, tribal corporation, or tribal member may be prosecuted by a state in federal court no matter where this evasion occurs geographically.

Conclusion

Mr. Chairman, I thank you for your interest in my testimony. I am prepared to answer any questions you may have.



J&J INVESTMENTS LTD.

April 25, 1998

The Honorable Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs
Unites States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of March 23, 1998 and your kind words about my testimony before the Committee on Indian Affairs on March 11, 1998. Again, I, as well as the National Association of Convenience Stores ("NACS")"and the Petroleum Marketers Association of America ("PMAA")" appreciate the opportunity to testify before you on the important issue of Native American state excise tax evasion. I appreciate the open mind you are keeping on this issue and look forward to working with you and your colleagues to find a mutually acceptable solution to this problem.

You asked in your letter that I respond to several additional questions for the March 11 hearing record. My responses to these questions, on behalf of NACS and PMAA, are listed below.

1. *Your testimony states that the tribes in New Mexico are not paying the state's $.32 per pack excise tax on cigarettes. Yet, New Mexico explicitly exempts such sales from this state tax, allowing tribes to impose their taxes. Are you characterizing this as illegal tax evasion?*

   It was not my intent to characterize the failure by Native Americans to pay the New Mexico state excise tax on cigarettes as unlawful tax evasion. If my testimony gave that impression, let me clarify that testimony for the record.

   You are correct that in 1992 New Mexico exempted sales by Native Americans on reservation lands from paying the state cigarette excise tax. It is important to understand why this exemption came about. In the late 1980s and early 1990s, Native Americans were importing tobacco products from Colorado and Idaho in order to evade New Mexico's excise tax on cigarettes. New Mexico tobacco wholesalers complained to the state

1306 Indian Wells Road • Alamogordo, NM 88310 • (505) 434-1100

legislature about this decrease in their sales, and the legislature responded in 1992 by exempting all tobacco sales on reservations from the state excise tax.

However, Native Americans in New Mexico have not confined their use of tax exemption to reservation lands. I am aware of at least one Native American smokeshop in the Albuquerque area that is situation on non-reservation land and yet still sells tobacco products free of state excise taxes. This outlet, and perhaps others in New Mexico, indeed are evading state excise taxes on tobacco.

The state affiliates of NACS and PMAA have attempted and will continue to attempt to have the 1992 New Mexico exemption repealed. Until that time, non-Native American tobacco retailers will continue to attempt to compete with Native American tobacco retailers in the face of an almost insurmountable competitive disadvantage.

2. *Should states be required to pursue all of the options recognized by the Supreme Court, including negotiations, before they are allowed to sue in Federal court?*

No, but in fact states have pursued all of the options suggested by the Supreme Court – generally to no avail. In Oklahoma v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905 (1991), Oklahoma contended that the Court's ruling in that case gave the state "a right without any remedy" Id. At 912. The Court responded by identifying several alternative remedies through which a state could enforce its Court-recognized right to require Native Americans to act as the state's agent when non-Native Americans purchase motor fuels or tobacco products from Native American enterprises. Those suggested remedies are as follows: (1) sue individual agents or officers of a tribe for evaded state taxes; (2) collect the tax from wholesalers; (3) enter into agreements with tribes; or, (4) seek appropriate legislation from Congress.

To varying degrees, each of these remedies, apart from the final one, have been attempted and discarded by individual states. Tribal officers have asserted successfully the shield of tribal sovereign immunity if they are sued concerning official activities undertaken on behalf of their tribe. Ex parte Young, 28 S.Ct. 441 (1908).

In New York, that state's attempt to collect tobacco excise taxes from tobacco wholesalers before the tobacco products arrived on Indian lands was met with violent protests by Native Americans in which lives were lost and major interstate highways were blockaded. Not surprisingly, New York has backed off this strategy in the face of these violent protests.

In theory, compacts or agreements between tribes and states should be feasible, but only if both sides to the negotiations have relatively equal bargaining power. In many of the agreements between tribes and states that have been reached to date, states have lacked the bargaining power to require tribes to fulfill their duty as set down by the Supreme Court. It is just this inequality of bargaining power that Section 3 of S.1691 will remedy. When Section 3 is enacted, tribes will be forced to bargain in good faith with the states because the state will have the power to enforce its rights in federal court if the tribe does not.

Currently, tribes have little to fear from litigation with the states over Native American state excise tax evasion the states in essence have a right without a ready remedy.

As a result, the only practical remedy identified by the Court that is left is to seek legislation from Congress, which is exactly the course NACS and PMAA are pursuing. Given Congress' constitutional power to regulate commerce with Native American nations, a federal solution to the issue of Native American state excise tax evasion is the most efficient, least costly, and most practical solution faced by many states across the nation.

3. *Please provide the amount of the tax revenue you claim is "lost" to the State of New Mexico due to retail sales on Indian lands each year, and the source and methodology used in arriving at that figure.*

In 1998, according to the New Mexico Taxation and Revenue Department ("TRD"), Native American motor fuels state tax evasion will reach approximately $14 million. In addition, the TRD estimates that Native American tribes will sell approximately 6 million packs of cigarettes in New Mexico in 1998 without paying state excise tax on these products, resulting in a loss of approximately $22 million in tobacco excise tax revenue to the state.

* * *

Again, thank you for the opportunity to appear before the Senate Indian Affairs Committee. If I, NACS, or PMAA can provide you or your staff with additional information, please do not hesitage to contact us.

Sincerely yours,

John Lattauzio
President

TESTIMONY OF GREG LOVE

PRESIDENT, LOVE'S COUNTRY STORES, INC.

ON BEHALF OF THE

SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

AND

NATSO -- REPRESENTING THE TRAVEL PLAZA AND TRUCK STOP INDUSTRY

BEFORE THE

SENATE INDIAN AFFAIRS COMMITTEE

HEARING ON NATIVE AMERICAN SOVEREIGN IMMUNITY

March 11, 1998

Introduction

Good morning, Mr. Chairman. My name is Greg Love. I am President of Love's Country Stores, a chain of 127 convenience stores and motor fuels outlets operating in eight western states, including Oklahoma, New Mexico, and Arizona. Love's is headquartered in Oklahoma City, Oklahoma.

I am appearing here today on behalf of the Society of Independent Gasoline Marketers of America ("SIGMA") and NATSO, which represents the travel plaza and truck stop industry. SIGMA is an association of over 260 independent gasoline marketers operating in all 50 states. Last year, SIGMA members sold over 30 billion gallons of motor fuel, representing over 21 percent of all motor fuels sold in the United States in 1997. SIGMA members supply over 28,000 retail outlets across the nation and employ over 200,000 workers nationwide. NATSO, Inc. (formerly the National Association of Truckstop Operators) is the professional and legislative representative of America's $35 billion travel plaza and truckstop industry. NATSO was founded in 1960 and currently represents nearly 1,100 member locations offering a diverse array of facilities and services to professional truck drivers and the traveling public."

I would like to thank the Committee for holding this hearing today. Petroleum marketers in Oklahoma and other states have been facing the issue of Native American state excise tax evasion for over 15 years. A public examination of this issue is long overdue.

Native American Excise Tax Evasion in Oklahoma

I am here today for one very simple reason: to tell this Committee about motor fuels excise tax evasion by Native American tribes in Oklahoma. You may hear other testimony today that asserts that this tax evasion problem no longer exists in Oklahoma. Nothing could be further from the truth.

We must all be clear in our understanding of the type of tax evasion at issue here. This issue is not about Native Americans evading state excise taxes imposed on the tribes. The U.S. Supreme Court has stated conclusively that the states do not have the authority to impose state excise taxes on the tribes. SIGMA and NATSO do not dispute the Court's position on this narrow issue.

The tax evasion that is at issue here is evasion of a tribe's obligation to collect state excise taxes when a non-Native American purchases gasoline or diesel fuel from a tribal truck stop or convenience store. The Supreme Court has stated repeatedly that tribes have an obligation to act as an agent of the state in collecting these state excise taxes from non-Native Americans, just as my company has an obligation to assist the state in collecting the taxes for purchases at our stores.

For many years in Oklahoma, Native American tribes refused to fulfill this obligation. And this refusal placed my company and others at a severe competitive disadvantage. Simply stated, the Native American state tax excise evasion placed us in a position in which it was impossible for our company to make a profit on our operations that competed directly with Native American stations.

Let me give you an example of this competitive disadvantage. We prepared an actual profit and loss statement for one of our stores that has been in direct competition with a tribal travel plaza. In 1995, our company experienced a loss from that store of just over $5,000 on sales of over $6.5 million. If a Native American tribe owned that store, and evaded payment of state taxes, that store would have made a profit of over $925,000 on the same level of sales. This example illustrates just how profitable tax evasion can be.

In response to exactly this type of situation, we petitioned our state government in Oklahoma for a solution. To its credit, our government responded. Not once, but twice, Oklahoma was forced to take Oklahoma tribes all the way to the U.S. Supreme Court in its attempts to enforce the state's motor fuels excise tax laws.

Finally, in 1996, Oklahoma was able to reach an agreement with several of the most active tribes in the motor fuels retailing business in Oklahoma. In return for the fulfillment of the tribe's obligation to collect and remit motor fuel excise taxes to the state, participating tribes are to receive a payment from the state equal in FY 1999 to 4.5 percent of all state collections of motor fuel excise taxes.

Shortcomings of the Oklahoma Agreement

On paper, this agreement should have solved our state's problem. It didn't.

First, only nine of Oklahoma's 39 registered Native American tribes have signed the agreement. That means that over 75 percent of Oklahoma's tribes are not bound by this agreement and are not required to collect and remit state excise taxes on the motor fuel purchased by non-Native Americans at their retail outlets.

Second, the agreement is entirely voluntary on the tribe's part. Those tribes that have signed the agreement may withdraw from the agreement at any time and return to the practice of excise tax evasion.

Third, the agreement does not prevent Native American tribes from evading state excise taxes either by manufacturing gasoline or diesel fuel themselves or by importing these motor fuels from outside of the state (because state enforcement of its taxes on interstate sales is problematic without federal support. Attached to my testimony are letters and articles from representatives of Oklahoma tribes that indicate that they are trying to import motor fuels from Texas and New Mexico to evade the excise tax collection system set up by the state.

Fourth, the agreement covers only excise taxes on motor fuels. It does not cover sales or excise taxes on tobacco products. As the January 1998 photographs attached to my testimony show, even the Oklahoma Choctaw tribe -- which has signed a motor fuels excise tax agreement with the state -- publicly advertises no sales taxes on chewing tobacco sold at one of their outlets.

In short, any testimony you may hear today that the problem Oklahoma has experienced with Native American excise tax evasion has been solved is inaccurate. Instead, the Oklahoma solution is no more than a stop-gap band-aid solution which has not been effective in stopping all tax evasion and likely will unravel further in the near future.

An Imbalance of Negotiating Power

Why did the state of Oklahoma enter into these seemingly one-sided agreements with the tribes? The answer to that question is simple: lack of bargaining power. Under Supreme Court decisions, the state has the right to these state excise taxes, but does not have the ability to enforce that right when Native Americans do not fulfill their obligation to collect and remit the taxes. Without the ability to petition our judicial system for a remedy, the state of Oklahoma has a right without a remedy.

This Committee in particular and Congress in general has the ability to alter this balance of bargaining power. SIGMA and NATSO urge this Committee to pass legislation that gives states the express authority to sue Native American tribes in federal court for evading state excise taxes on motor fuel and tobacco when these products are purchased by non-Native Americans at Native American stores. The Supreme Court has stated that it is up to Congress to authorize such lawsuits. SIGMA and NATSO urge Congress to pass such legislation without delay.

Oklahoma is Not Alone

The problem of Native American state excise tax evasion is not unique to Oklahoma. Native American tribes currently are evading state excise and/or sales taxes on motor fuels and tobacco products in the following states: New York, Michigan, North Dakota, Washington, California, New Mexico, Kansas, Nevada, Arizona, Iowa, and, South Dakota.

And the potential is present for this evasion to spread even farther. There is "Indian Country" in at least 38 states nationwide on which Native Americans could establish retail outlets and attempt to evade state excise taxes. This problem will only continue to grow.

SIGMA and NATSO Support Section 3 of S. 1691

SIGMA and NATSO strongly support Section 3 of S. 1691, introduced three weeks ago by Senator Slade Gorton, a member of this Committee. Section 3 of this legislation will empower state governments by authorizing them to enforce their tax laws in federal court. This legislation will increase the bargaining power of states in their negotiations with their Native American tribes, and will force the tribes to bargain in good faith.

Conclusion

Thank you very much for this opportunity to present SIGMA's and NATSO's views. I would be pleased to respond to any questions you may have about my testimony.

Indian Citizens Empowerment
ICE PAC
Political Action Committee

(405)422-2655 FAX (405)422-2039 P.O. BOX 763 EL RENO OK 73036

Oklahoma Indian Tribes Working Together.

August 3, 1997

R.T. Kahn Associates
136 East 79th Street
New York City, NY 10021-0435

Dear Mr. Kahn:

Thank you for your previous assistance in obtaining gasoline for Oklahoma Indian tribes. As you know, confirmed by a U.S. Supreme Court ruling, Indian tribes are not required to pay a state tax on gasoline sold on their lands. However, Oklahoma taxes the gasoline at the refinery and/or distributor effectively adding the tax to Indian gasoline. We have to continue looking for gasoline sources free of the Oklahoma state tax.

ICE Corporation represents the Oklahoma Indian tribes in their gas marketing efforts. We currently are serving eight (8) stations, with another 14 waiting for a stable source of gasoline. Presently we are capable of moving two (2) million gallons of gasoline a month, and anticipate a steady growth. There are 39 Indian tribes in Oklahoma with each having or planning at least one (1) gasoline outlet. Tribal stations require regular unleaded, super unleaded and diesel.

Your suggestion to receive gasoline at a Houston port seems reasonable if we can overcome the transportation and other cost factors. Hauling gasoline that distance would cost approximately .25 cents a gallon. This .25 cent transportation cost and the federal tax of .184 cents would show a built-in cost of .434 cents per gallon. With all the costs considered, ICE Corporation would like to have a gasoline price of approximately .80 cents per gallon. The portion taxed by the state, .17 cents is taxed by tribal tax commissions for operation of tribal governments.

Thank you for your assistance.

Sincerely,

Tyler Todd
Chairman/CEO
ICE PAC/Corporation

Tribal Caucus Report:

Indian Citizen Empowerment Corp. To Deal With Fuel Tax Problem

By Bob Perry
Pawnee Tribe

Oklahoma Tribal Representatives have met for several months to develop a means of distributing motor fuels to tribal retailers while protecting the sovereignty of tribal rights guaranteed by treaties signed years ago between Oklahoma Tribes and the U.S. Government.

This becomes confrontational to Oklahoma due to taxation of motor fuels. Recently, a corporation has been formed, by many of the 39 federally recognized tribes in our state, which addresses issues concerning the sovereignty of Indian Tribes compared to a state's power to tax tribal enterprises.

The Indian Citizen Empowerment Corporation (ICE CORP) is being formed to make arrangements with out-of-state motor fuel producers, which have no other commitments for delivery within Oklahoma, to deliver motor fuel products to tribal fuel stations. The issue arises to whether tribes must pay state tax.

Some tribes, which have motor fuel dispensing stations, have signed "compacts" with the state of Oklahoma. Allegedly, some of these tribes have become disenchanted with the amount of "their" share of the proceeds provided under provisions of their "compact" and are becoming increasingly interested in pursuing the ICE CORP approach.

Under provisions of P.L. 93-638, Indian (Native American) Tribes must move toward self-determination and self-governance. Recently, Ada Deer, the head of the Bureau of Indian Affairs, U.S. Department of Interior at the Sovereignty Symposium in Tulsa; sponsored, in part by the Oklahoma Supreme Court and the Oklahoma Indian Affairs Commission, stated, "Adoption of (U.S. HR 1554) some pending legislation would be tantamount (related) to governments taxing governments."

It seems that the only resolution will involve education, cooperation, negotiation, and legal decisions.

Home-based Businesses Hear Latest Information

By Trisha Gedon

With the theme "Revving Up For The 21st Century," Oklahoma Home-based and micro businesses focused on new technology at the 8th annual Home-based Business Association annual meeting and conference.

Glenn Muske, OSU Extension home-based specialist announced his web site is http://www.okstate.edu/hes/fcj/cohbe. "This provides information on upcoming workshops, educational events and fact sheets as well as links to other home-based sites," he explained.

The Extension service is also initiating a "Listserv." This is basically an e-mail discussion group targeting home-based and micro-based business owners, he said."Individuals who subscribe to the list will be able to share and exchange ideas relating to operating their own business. This list will provide business owners with another way to network."

Muskie will serve as the list's moderator. To subscribe, home-based operators should send an e-mail to listserv@okstate.edu. In the body of the message, type: subscribe okhbb1 <firstname> <last name>.

Musie also announced OSU has a 4-hour basic Internet seminar available to groups.





Love's
Country Stores, Inc.

"The Heartland of America"

10601 North Pennsylvania
P.O. Box 26210
Oklahoma City, OK 73126
(405) 751-9000

April 21, 1998

The Honorable Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of March 23, 1998 expressing your appreciation for my testimony before the Committee on Indian Affairs on March 11, 1998. As I stated at that time, I, and the organizations I represented at the hearing, appreciate your willingness to solicit testimony on the issue of Native American state excise tax evasion. This issue has been a problem for my company and other marketers in Oklahoma for years and we are pleased that you and the Committee are taking the time to examine this problem.

Below are detailed answers to the supplemental questions you posed in your letter. I am responding on behalf of my company as well as the Society of Independent Gasoline Marketers of America ("SIGMA") and NATSO – Representing the Travel Plaza and Truck Stop Industry.

1. *Do you feel that Oklahoma's experience with this matter is typical of other states? Because as you may know, the Arizona Legislature found that over 200 taxation agreements are in existence between tribes and states?*

Oklahoma's experience in dealing with Native American state excise tax evasion is typical in some ways and atypical in others. First, the problem Oklahoma has faced – a complex legal relationship between tribes, the state, and the Federal Government – is common to all states across the country. The U.S. Supreme Court has attempted, with limited success, for over three decades to resolve conflicts between tribes and states on the issue of state excise tax evasion.

Second, the potential for state tax evasion by Native Americans when non-Native Americans purchase motor fuels or tobacco products from a tribal enterprise exists

across the country. While it is true that a minority of states currently are experiencing a problem with Native American excise tax evasion, the number of these states has increased significantly over the past decade and likely will increase further in the future if a solution is not found.

Third, Oklahoma's experience has been typical of other states in the frustration state officials have experienced in attempting to halt Native American excise tax evasion. Despite the fact that the Supreme Court has stated in plain language that the tribes have a duty to collect and remit these excise taxes to the state, the tribes' legal maneuvering has stymied state enforcement actions for years. Ultimately, weary of conflict and realizing the limited options open to the state, Oklahoma entered into a motor fuels excise tax agreement with several tribes in the state. However, as I noted in my testimony, even this agreement is flawed in several ways: (1) only nine of Oklahoma's 39 tribes have signed the agreement; (2) the agreement is entirely voluntary on the tribe's part; (3) the agreement does not prevent Native American tribes from evading state excise taxes either by manufacturing gasoline or diesel fuel themselves or by importing these motor fuels from outside of the state; and, (4) the agreement covers only excise taxes on motor fuels – it does not cover sales or excise taxes on tobacco products.

As I stated in my testimony:

> "Why did the state of Oklahoma enter into these seemingly one-sided agreements with the tribes? The answer to that question is simple lack of bargaining power. Under Supreme Court decisions, the state has the right to these state excise taxes, but does not have the ability to enforce that right when Native Americans do not fulfill their obligation to collect and remit the taxes. Without the ability to petition our judicial system for a remedy, the state of Oklahoma has a right without a remedy."

The same is true in other states with respect to compacting with tribes for the collection of state excise taxes. While I am not in a position to comment on the exact number of agreements that have been reached between tribes and states across the nation, one characteristic is common within most of these agreements: potentially faced with years of contentious litigation, many states have chosen to enter into one-sided or lop-sided agreements with tribes.

This is the path Oklahoma, and I suspect, many other states have taken. While it may be true that over 200 taxation agreements are in existence, it also likely is true that states would welcome federal legislation such as Section 3 of S. 1691. Currently, despite several Supreme Court decisions in their favor, states have little or no bargaining power to require tribes to collect state excise taxes. Due to this lack of bargaining power, many states have entered into one-sided or lop-sided agreements with tribes. Section 3 will strengthen a state's bargaining position when negotiating

future agreements, leveling the negotiating table which currently is tipped substantially in the tribes' favor.

Oklahoma's experience is atypical in several ways. First, several of the Native American tribes in Oklahoma have been among the most aggressive practitioners of state excise tax evasion over the past two decades. These tribes have built large truck stops and smoke shops across the state and have aggressively advertised their state excise tax evasion in newspapers, on billboards, and on signage at their outlets.

Second, Oklahoma's state government has been equally aggressive in attempting to curb Native American state excise tax evasion. The state has litigated the issue twice to the level of the Supreme Court, and has passed several pieces of legislation designed to halt this tax evasion. In some ways, Oklahoma has been one of the primary battlegrounds over the issue of Native American state excise tax evasion.

2. *Didn't the Supreme Court rule in 1995 that Oklahoma illegally sought to impose its tax on tribes, even though "legal incidence" of the tax was directed at the retailer?*

The Supreme Court case you have referenced was Oklahoma Tax Commission v. Chickasaw Nation, 115 S.Ct. 2214 (1995). In that case, the Court held that Oklahoma could not enforce its existing motor fuels tax on motor fuels purchased by non-Native Americans from Native American retailers because the Court concluded the incidence of the motor fuels tax in Oklahoma fell on the Native American retailer. The Court held that "a State is without power to tax reservation lands and reservation Indians." *Id.* at 2220. However, this case does not conflict with other Court decisions which have held that Native Americans must act as an agent of the state to collect state excise taxes imposed on non-Native Americans when the motor fuels are sold by a Native American enterprise. *See*, New York Dept. of Taxation & Finance v. Milhelm Attea & Bros., 114 S.Ct. 2028 (1994), Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 96 S.Ct. 1634 (1976), and, Oklahoma Tax Com'n v. Potawatomi Indian Tribe, 111 S.Ct. 905 (1991).

In the Chickasaw case, the Court prohibited the state from enforcing the tax because the incidence of the tax was on the Native American retailer, not because the state did not have the right to require the tribe to act as its agent in collecting the tax from a non-Native American consumer. In fact, subsequent to the Chickasaw decision, Oklahoma amended its motor fuels tax law to clarify that the incidence of the tax was on the consumer. This amendment conformed Oklahoma's laws to the Court's decisions and permitted the state to require the tribes to act as its agent.

Section 3 of S. 1691 would permit states to bring an action against a Native American tribe only if the incidence of the tax falls on the non-Native American consumer. Thus, if the incidence of a state excise tax falls on the tribe or a tribal retailer, then the state would not be authorized to bring an action under Section 3. As a result, the Chickasaw case would not be impacted by Section 3.

3. *Should Congress also take action to discourage state attempts to impose taxes that are later found to be illegally imposed on a tribe or its members?*

The Supreme Court has decided that the state should be permitted to enforce such taxes against tribes or their members. If Congress decides that such a decision should be codified into federal statute, SIGMA and NATSO would not oppose such legislation.

4. *Do you feel that any particular tribe is seeking to compete directly against you and your stores?*

Currently, the following Oklahoma tribes operate truck stops, travel plazas, and smoke shops that compete directly with Love's stores in Oklahoma: Chickasaw; Cherokee; Choctaws; and, Seminoles. Together, these tribes operate eight of these outlets in Oklahoma.

5. *Please provide the amount of tax revenue you claim is "lost" to the State of Oklahoma each year due to retail sales on Indian land, as well as the source and methodology used in arriving at that figure.*

The Oklahoma Tax Commission ("OTC") estimates that in Oklahoma's FY 1997 that the state lost approximately $13.3 million in motor fuels state excise taxes from Native American tax evasion. Since 1996, Oklahoma has entered into motor fuels excise tax agreements with nine Native American tribes, which has reduced this evasion figure substantially. However, the OTC has stated that it is impossible to estimate the amount of Native American state motor fuels excise tax evasion that is ongoing through the importation of motor fuels from other states or through the vertical integration of the production process. As I stated in my testimony, the OTC is aware that several tribes are attempting to circumvent their agreements with the state by importing from other states or building production facilities on Native American lands.

Again according to the OTC, under agreements with several Native American tribes, Oklahoma did not collect approximately $20.6 million in state tobacco excise taxes in FY 1997. The OTC has predicted that this number will rise considerably in FY 1999, but has been unable to predict a precise number.

* * *

Again, thank you for the opportunity to appear before the Senate Indian Affairs Committee. If I, SIGMA, or NATSO can provide you or your staff with additional information, please do not hesitate to contact us.

Sincerely,

Greg Love
President



GREGORY E. PYLE

CHIEF

CHOCTAW NATION OF OKLAHOMA

Testimony before the Senate Committee on Indian Affairs

March 11, 1998

Mr. Chairman and members of the Committee, I am Gregory E. Pyle, Chief of the great and proud Choctaw Nation of Oklahoma. We are the third largest Indian tribe in the country. On behalf of our 107,000 members, I want to express my sincere appreciation for the opportunity to appear before you and address concerns about Senate Bill 1691 shared by me, the Choctaw Nation of Oklahoma, and Native Americans and their respective tribes across the country.

First, let me make clear that I understand that the United States Supreme Court has said on numerous occasions that the sovereign status of Indian tribes is subject to the plenary power of the United States Congress. Notwithstanding those pronouncements, many attacks and incursions on tribal sovereignty have occurred in the judicial branch over past decades. However, the Congress, much to its well-deserved credit has demonstrated great respect to the Indian nations in this country and has, except on rare occasions, declined to diminish our sovereignty. Rather, it has reaffirmed our status in that regard on numerous occasions. For that, we are very grateful.

Sovereign immunity is perhaps the most significant tribal related issue facing Congress this year. It is also one of the most divisive. As you know, opinions on this issue run very strong on both sides. The recently introduced Senate Bill 1691 is sadly indicative of these decisions.

Tribal sovereignty is the life blood of the American Indian's ability to maintain our culture, heritage, and right of self-determination. For many years our people were on the bottom rung of the social and economic ladder in the country. After the passage of PL 93-638, Indian Self-Determination Act, the U.S. policy changed to one of tribal self determination and economic development. American Indian tribes were encouraged to become self-sufficient, free of federal financial dependency. Needless to say, Indian tribes welcomed this new policy and embraced it with great enthusiasm. **For each and every dollar Indian tribes make and put back into assistance for our citizens, this is a dollar less we are dependent on the Federal or State Government. If tribes were not considered sovereign entities and not recipients of federal funding, the burden of responsibility of care for these citizens would fall back on the Federal or State Government.**

We began to figure out ways to generate revenues to finance this goal of financial independence. Unlike local, state, and federal governments, Indian tribes have little or no tax base or other ways to raise revenues, as other conventional governments have. Most of us recognized early on that Indian tribes had to become capitalists. We began to look at commercial endeavors, such as hotels, resorts, truck stops, manufacturing, and real estate rental properties, such as shopping centers.

Those opposed to our tribal sovereignty can exhaust themselves citing isolated incidents and worst case scenarios. In fact, there have been a few instances in which tribal immunity in commercial affairs has resulted in unfortunate inequities. This has become overshadowed by the *many successes of Tribal Sovereign Immunity.* **This issue can be resolved by tribes and businesses setting up an agreement which can result, at the concurrence of the tribe, with a limited waiver of sovereign immunity pertaining to each specific business of enterprise upon approval of that respective tribe.** ***With this waiver, both parties' interests can be protected.***

Sovereign immunity can be a positive force for all parties- Indian and non-Indian alike- when utilized appropriately. The Choctaw Nation conducts business with our non-Indian business partners and with the State of Oklahoma while preserving our sovereign immunity. For many years we could not agree with our state government in Oklahoma about taxation practices. It was a very difficult situation, both sides were adamant. But in the end we were able to put aside these differences and arrive at agreements which work to everyone's benefit. And we did it without sacrificing our immunity. In fact, I submit without this sovereignty, we may have never been able to reach compacts with the state in gasoline and tobacco taxation.

These compacts were not easy. There were endless disputes, roadblocks, and land mines which could have blown up in our faces. Negotiations were tough and sometimes downright contentious. But in the end our determination on both sides to come to an agreement and put these issues behind us prevailed. *Both of our governments could then return to our most important duty of providing for the general welfare of our citizens.*

This includes providing jobs, promoting education, and caring for those of our citizens who cannot care for themselves. These and other serious tribal obligations illustrate why Indian tribes engaging in commercial activities are not like private corporations or other businesses. We engage in business activities to provide revenues to operate our governments. **Our profits are not used to make individuals wealthy or to compensate shareholders. We use our profits for such basic things as educating our children, improving our people's healthcare, providing safe and decent housing and other causes- things which most Americans take for granted. These are the goals and purposes of Choctaw tribal enterprises.**

Because of our gaming revenues, economic development ventures and money earned from our Fuel Tax Compact with the State of Oklahoma, the Choctaw Nation has began tribally funded programs to provide eyeglasses, dentures, hearing aids and other medical equipment needs to our tribal members. We have been able to supplement our Low Income Energy Assistance Program with an additional $100,000 and $200,000 for college scholarships this year alone. The Choctaw Nation also allocated $400,000 this year for homes for destitute people. Just recently, fires have resulted in the loss of homes of some of our citizens. We were able to respond immediately with assistance, providing

them with a place to live. We are also able to provide $100,000 for Boys and Girls Clubs in several counties and able to partner with local public schools in providing after school recreation programs for youth in socially disadvantaged areas. This is of utmost importance in a state with one of the highest teen pregnancy rates in the Nation. This will be one of the greatest drug prevention programs available, simply by providing structures, supervised activities for young people in the afternoons and on weekends. At the end of this testimony I am including remarks by many of our non-Indian business partners indicating their support for our efforts at home and in Washington, D.C. **These programs are wonderful examples of how tribal sovereignty benefits both the American Indian and non-Indian communities.**

By sharing state, federal, private and tribal resources we are in the process of constructing an American Indian Center at Eastern Oklahoma State College in Latimer County, which will reduce the dropout rate by providing counseling and academic tutorial assistance for our Indian students. The Choctaw Tribal Council and I have contributed $1.2 million of tribal funds for this project.

The Choctaw Nation has created 1,500 new jobs. We are building a new hospital, not by waiting for the federal government to build it for us but by utilizing existing health dollars, fuel tax dollars, gaming dollars, and tribal economic development dollars. **This is going to provide immediate services to our Indian people and reduce the burden of the U.S. Government.** The projected cost of this hospital from the Federal Government was approximately $39 million. The tribe will be able to build this facility for approximately $22 million. Stop and think how this is reducing the federal deficit, by not being a $39 million burden on the federal government. We did not have to come to any federal funding agency with a request for additional dollars for construction, and the tribe is able to build the hospital at almost half the formerly projected cost. We as Choctaws welcome these challenges and opportunities.

By the Choctaw Nation partnering with agencies such as Little Dixie Community Action Agency and by utilizing the services of both, we were able to provide more job opportunities for everyone in the community. Please understand, my priority is the Choctaw people, but I want to stress that when we succeed in business, **everyone benefits**. Our businesses provide jobs, additional income for the area, additional taxes for the community and allow opportunities for retail sales. This couldn't be more prevalent in today's society with federal legislation such as ***Welfare-to-Work*** **that has changed society and provides a new generation of hope. With the restructuring of the Welfare Program the Choctaw Nation must have the opportunity to continue with economic development and provide more jobs to more people who will be without social assistance.**

The Choctaw Nation exercises our Tribal Sovereignty by compacting with the state, and this relationship is working well for both the state and our tribe. The tribes and states and others will ultimately resolve our conflicts and jurisdictional difficulties. In addition to the issues of tobacco and motor fuel taxes where several tribes and the State of Oklahoma have entered into compacts which are mutually beneficial to both sides, the Choctaws, Chickasaws, and Cherokees are currently engaged in meaningful discussions that may likely resolve state-tribal conflicts on water rights.

Gaming and smoke shops have been successful ventures for the Choctaw Nation. These ventures have provided a tremendous means to virtually support additional businesses, social programs, education programs and health programs of the Choctaw nation.

I would like to point out that last year alone, gaming revenues allowed 500 additional higher educational scholarships to be awarded to Choctaw youth. I anticipate that this year with the help of gaming revenues we will be able to send approximately 1,000 Choctaw youth to college. **This is self-determination working at its best.**

The ICDBG (Indian Community Development Block Grant) program has played a very significant role in our success in the field of economic development. This program not only allowed us to enter into competition for federal dollars, it has allowed us to create 234 jobs. Most of our truck stops are ICDBG projects, and all of them are profitable. I want to commend Congress for designating funds for this extremely successful program and I cannot think of a way it could be better. I understand some would like to transfer this under a new entity. I want to reiterate that this is one of the most successful programs that is provided to the Choctaw Nation today as the program is presently administered.

Congress is now considering subjecting to the full array of remedies the courts and forcing us to submit to being taxed by state governments. This would not only severely retard our progress on our journey to self-determination and financial independence, but it would also lead to the destruction of many tribal governments. Adopting legislation to further such a policy would run exactly counter to the policies and legislation adopted in the 1970's, and even recently, which has encouraged tribal self-determination.

The United States Supreme Court has concurred with this school of thought on numerous occasions. In 1986 in the case of *Three Affiliated Tribes v. World Engineering*, the Supreme Court was considering the tribal challenge to a North Dakota statute which required Indian tribes to waive tribal sovereign immunity from unconsented suit before a tribe could access the state courts as to tribal claims. The court very carefully detailed the federal policy of tribal sovereignty and self determination and struck down the North Dakota law as being pre-empted by federal policy and unduly burdensome on tribal sovereignty and federal interests in promoting tribal self-determination.

I respectfully ask that you reject any proposed legislation which would subject Indian Tribes in America to involuntary taxation by the states, or unconsented coercive jurisdiction of state and federal courts.

Let us get on with the noble pursuit you have previously encouraged us to undertake. Let us work our way off the federal dole without fear of the destruction of our tribal governments which are so important to our people and their futures. **To do otherwise would give the appearance that we are being punished for too much success in our efforts to achieve what the United States has asked of us.** I urge this Committee and the Senate, on behalf of the citizens of the Choctaw Nation, to defeat legislation which would strip us of our sovereignty and our ability to care for our children, elders and disadvantaged citizens.

Again, I wish to express my sincere appreciation for the opportunity to be here and share my thoughts with you. Thank you very much.

Gregory E. Pyle, Chief
Choctaw Nation of Oklahoma

Written testimony submitted to Congress
March 11, 1998

C & I CONSTRUCTION, INC.
RT.1, BOX 250 WILBURTON, OK (918)465-5566

March 2, 1998

SENATOR BEN NIGHTHORSE CAMPBELL, CHAIRMAN
SENATE COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510-6450

RE: BUSINESS RELATIONSHIPS WITH NON-INDIAN BUSINESSES

DEAR SENATOR CAMPBELL:

C & I CONSTRUCTION, INC. HAS DONE BUSINESS WITH THE CHOCTAW NATION OF OKLAHOMA FOR THE PAST 2 YEARS. WE HAVE AN EXCELLENT BUSINESS RELATIONSHIP THE CHOCTAW TRIBE.

THE LOSS OF SOVEREIGN IMMUNITY WOULD CRIPPLE THE CHOCTAW TRIBE'S ABILITY TO GOVERN ITSELF AND COULD JEOPARDIZE ITS BUSINESS VENTURES AND RELATIONSHIPS WITH BUSINESSES OUTSIDE THE TRIBE. THIS WOULD HAVE A DIRECT IMPACT ECONOMICALLY ON BUSINESSES SUCH AS OURS THAT HAVE COMMERCIAL INTEREST WITH CHOCTAW NATION.

WE URGE YOU TO SUPPORT THE CHOCTAW NATION'S STAND ON SOVEREIGN IMMUNITY, AS WE DO, SO WE CAN CONTINUE OUR BUSINESS RELATIONSHIP WITH THEM.

SINCERELY,

Clayton Browne Jr.

CLAYTON BROWNE, JR.

Paul Howser Concrete
P.O. Box 308
Hugo, Oklahoma 74743

March 2, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Paul Howser Concrete, has done business with the Choctaw Nation of Oklahoma for the last 10 years. we have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw nation and have never had any problems with late paymenis or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Paul Howser

Paul Howser
Owner
Paul Howser Concrete



Miller Office Equipment

403 E. Main • P.O. Box 880 • Antlers, OK 74523
Administration: (405) 298-3321
Sales: (800) 822-3669

March 2, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Miller Office Equipment, Inc. has done business with the Choctaw Nation of Oklahoma for the last 23 years. We have an excellent business relationship with the tribe and value them very much as a customer.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Brad Miller
President
Miller Office Equipment, Inc.

Family Snacks Incorporated
405 S. Leonard Street
Liberty, Missouri 64068-2599
(816) 781-6700

February 27, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Guy's Foods has done business with the Choctaw Nation of Oklahoma for the last two years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems whit late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded out business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Ron Geschwind
Region Sales Manager
Guy's Foods
729 Overhead Drive
Oklahoma City, Oklahoma

Regional Office • 8217 S. Walker • Oklahoma City, OK 73139 • (405) 631-5361 • FAX (405) 631-5388

March 3, 1998
B & I Sales, Co.
PO Box 205
905 North Wood Street
Caney, KS 67333
800-235-6478

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, B & I Sales Company, has done business with the Choctaw Nation of Oklahoma for the past eleven years. We have always maintained an excellent business relationship with the tribe.

We have found them to be very friendly, efficient, and prompt with payments. They are one of our most valued customers and we do a large volume of business with the Choctaw Nation. The issue of sovereign immunity has never interrupted or impeded our business relationship with the Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with the Choctaw nation. Because they are such a valued customer, we would certainly hate for this to happen.

Therefore, we would encourage you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our long and valued business relationship with them.

Sincerely,

William A Bartusek

William A. Bartusek
President
B & I Sales Company

WYNN ASSOCIATES
ARCHITECTS • PLANNERS

March 5, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our Company, Wynn Associates, has done business with the Choctaw Nation of Oklahoma for the last three (3) years. We have an excellent business relationship with the tribe.

We have always enjoyed our relationship with the Choctaw Nation, and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside of the tribe. This would have a direct impact economically on many businesses, such as ours, that have commercial interests with the Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue with a positive business relationship.

Respectfully,

Tim Wynn
Architect
Wynn Associates

TW/bb

FIRST NATIONAL CENTER, SUITE 128 • McALESTER, OK 74501 • 918 423-9093 (FAX) 918 426-8517

CENTRAL ELECTRIC
& INSULATION COMPANY INC.
225 WEST MAIN STREET
DURANT, OKLAHOMA 74701
(405) 924-7262

March 5, 1998

Senator Len Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D. C. 20510-6450

Dear Senator Campbell:

Our company, Central Electric and Insulation Co., Inc. has done business with the Choctaw Nation of Oklahoma for the last ten (10) years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

At this time I believe that the Choctaw Nation has a highly respectable Chief, a true leader and a Godly person that will take the Choctaw Nation to its highest standards it has ever reached and the loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commerical interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Larry E. Qualls,
President
Central Electric and Insulation Co., Inc.
225 W. Main
Durant, Oklahoma 74701



BUCKSKIN
Construction Company, Inc.
418 West Main
Wilburton, Oklahoma 74578
(918) 465-5533
Fax #918-465-5038

March 2, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee of Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Buckskin Construction Company, Inc., has done business with the Choctaw Nation of Oklahoma for the last 17 years. We have an excellent business relationship with the tribe.

We do a large volume of business with the Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with the Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on business such as ours that have commercial interests with the Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Stanley A. McCasland
President
Buckskin Construction Company, Inc.

SHERMAN
OFFICE SUPPLY INC.

XEROX

March 4, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell,

Sherman Office Supply has done business with Choctaw Nation of Oklahoma for a couple of years. We have an excellent business relationship with the tribe.

We do a lot of business with Choctaw Nation. They always pay prompt. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Lorne Minnick
Sales
Sherman Office Supply, Inc.

LM/jkc

512 North Travis • Sherman, TX 75090 • Phone 903 893-5515 • Fax 903 893-5510

AMLIN PUMP SERVICE

Marshall Amlin, Owner
P. O. Box 552 - Bonham, Texas 75418
903-583-8232

Gasoline Pumps
Installations
Tank Removals

Precision Tank
and Line Testing

March 4, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Amlin Pump Service has done business with the Choctaw Nation of Oklahoma for the past two (2) years. We have an excellent business relationship with the tribe and hope to continue to do so.

Over the past two years, we have done a large volume of business with the Choctaw Nation by doing two (2) new fueling installations, and three (3) fueling facility upgrades. We have never had any problems with late payments or unpaid invoices, and the issue of sovereign immunity has never been detrimental to our business relationship with the Choctaw Nation of Oklahoma.

The loss of sovereign immunity would crtpple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with the Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

AMLIN PUMP SERVICE

Marshall Amlin

Marshall Amlin, Owner

jb

Stephenson Wholesale Company, Inc.
GLC Marketing, Inc.
dba Indian Nation Wholesale Company

P.O. Box 70 • 230 S. 22nd St.
Durant, OK 74701
(405) 920-0125
Fax (405) 920-1323

March 2, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committe on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell,

Our company has had a very good business relationship with the Choctaw Nation of Oklahoma for several years. We do hundreds of thousands of dollars worth of business with them each week. Our invoices are paid on time and we have never had a single reason to be concerned about the professional way in which they do business.

We have learned that a bill has been introduced that would limit a tribes sovereign immunity if they are successfull in operating their business or if they receive federal funding for other projects that benefit the tribal members. This is outrageous in my opinion.

For the first time, Sovereign Indian Tribes in our country have the ability to compete in our new world economy and share in the wealth of the nation. Why, for goodness sake, take away the tools that they have so desperately needed for so many years just as they are now reaping the rewards of becoming self sufficient?

The loss of sovereign immunity would be a terrible blow to the Choctaw tribe's ability to govern itself and successfully compete in the business world. This would have a serious impact not only on the Choctaw tribe but my business as well since they are such large customers of my company.

I urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our strong business relationship with them. The Choctaw people are the foundation of our community and deserve everyone's support and I urge you to continue to give them the tools for success for their future and for the sake of our community.

Sincerely,

Ron Cross

Ron Cross
President & CEO

MARLOW CONSTRUCTION COMPANY

1102 NORTH FIRST STREET
DURANT, OK. 74701

Phone 580-924-6434

March 02, 1998

Senator Ben Nighthorse
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Marlow Construction Company, has done business with the Choctaw Nation of Oklahoma for the last three years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's abilIty to govern itself and could jeopardize its business ventures and relationships with business outside the tribe. This would have a direct impact economically on businesses such as ours that have commerical interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Carl Marlow
Owner
Marlow Construction Co.

Carl Marlow

Chapman, Inc.

Distributor
Gasoline
Diesel
Lubricants

P.O. Box 1298 • Sherman, Texas 75091 • (903) 893-8106 • Fax (903) 893-6731

3/9/98

Senator Ben Nighthorse Campbell
Chairmen
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

I would first like to take this opportunity to thank you for a wonderful job you are doing representing the great State of Oklahoma and the Indian tribes of the state. We are faced with some serious issuses reguarding sovereign immunity and I would like to express my concerns on this issue.

Our Company, Chapman, Inc., has done business with the Choctaw Nation of Oklahoma for the last 9 years. We have an excellent business relationship with the tribe.

We do a large volume of business with the Choctaw Nation and have never had any problem with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with the Choctaw Nation.

The loss of soverign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with the Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Andrew Olmstead

Andrew Olmstead,
Vice President

WEST ARK OIL COMPANY
P.O. Box 787 • 728 South 8th • Fort Smith, Arkansas 72902 • (501) 782-6291
U.S. 270 East & Alum Road • Hot Springs, Arkansas 71901 • (501) 262-3792

3/9/98

Senator Ben Nighthorse Campbell
Chairmen
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

I would first like to take this opportunity to thank you for a wonderful job you are doing representing the great State of Oklahoma and the Indian tribes of the state. We are faced with some serious issues reguarding sovereign immunity and I would like to express my concerns on this issue.

Our Company, West Ark Oil Company, has done business with the Choctaw Nation of Oklahoma for the last 9 years. We have an excellent business relationship with the tribe.

We do a large volume of business with the Choctaw Nation and have never had any problem with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with the Choctaw Nation.

The loss of soverign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with the Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Lee Olmstead,
President

BJ's Tire
518 ½ Hwy 70 East
Durant, OK 74702
(580) 924-1625

March 5, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, BJ's Tire, has done business with the Choctaw Nation of Oklahoma for the last ten years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses such as ours that have commerical interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

B.J. Mullens
Owner
BJ's Tire



chico arts
1045 HUMBLE ST.
EL PASO, TEXAS 79915
(915) 779-5636

March 3, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Chico Arts, has done business with the Choctaw Nation of Oklahoma since 1996. We have an excellent business relationship with Choctaw Nation.

We do a large amount of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have a direct impact economically on businesses like Chico Arts, that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Jesus Avila
Manager
Chico Arts, Inc.

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PARIS FIRE EXTINGUISHER CO.

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FIRE HOSE

HOSE REELS

March 4, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Paris Fire Extinguisher Co., Inc., has done business with the Choctaw Nation of Oklahoma for the last eight years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Gary Cook

Gary Cook
President

CC: Gregory E. Pyle



Choctaw Nation of Oklahoma

Office Of The Administrative Assistant

Drawer 1210 • Durant, Oklahoma 74702-1210 • (405) 924-8280

Gregory E. Pyle
Chief

Mike Bailey
Assistant Chief

April 10, 1998

Senator Ben Nighthorse Campbell, Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

In response to your letter of March 23, I am submitting the following answers to your supplemental questions subsequent to my testimony before the Senate Hearing Committee:

1. Is a general waiver of immunity necessary to solve the tax issues in Oklahoma?

   No. those issues are capable of being resolved by agreement. In fact, each time the State of Oklahoma has shown any interest in agreements regarding tax issues, we have come to the table and resolved them. In 1992, the Five Tribes, through our initiative, met with representatives of then Governor David Walters and the Oklahoma Legislature to discuss resolution of pending and potential disputes regarding state/tribal tax issues. At the time, the most pressing issue for the State was tobacco taxes. At the outset, we agreed that once we had resolved that issue through a Compact, we would begin working through other issues. We successfully reached an agreement regarding tobacco taxes. However, state officials did not show any interest in further negotiations until 1995 when an agreement was worked out on motor fuel taxes. The Tribes have not heard anything further from the State of Oklahoma concerning any other tax issue, but we remain interested in dealing with these matters.

2. What has your tribe's experience been in arriving at a negotiated agreement with the State of Oklahoma?

   See the response to question 1 above.

3. Please provide more information regarding the ownership of retail outlets in Oklahoma as an indicator of the gravity of the problem in your state.

   There are 4,135 fuel retailers in Oklahoma. Only 18 of these are American Indian owned.

Again, thank you for the opportunity to testify before the Senate Hearing Committee. I appreciate your concern and interest in these issues that affect all American Indians.

If you need additional information or if I can be of assistance in any way, please don't hesitate to call.

Sincerely,

Gregory B. Pyle, Chief
Choctaw Nation of Oklahoma

GEP/gg



INTER TRIBAL COUNCIL of ARIZONA

MEMBER TRIBES
AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT MCDOWELL YAVAPAI TRIBE
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB PAIUTE TRIBE
PASCUA YAQUI TRIBE
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

STATEMENT

March 11, 1998

Re: Senate Committee on Indian Affairs
Tribal Sovereignty, Contracts, Taxes and SB 1691

Mr. Chairman, Members of the Committee, Tribal Leaders and Staff. Thank you for inviting Inter-Tribal Council of Arizona to testify on this important issue.

My name is David Kwail and I am President of Inter-Tribal Council of Arizona and Chairman of the Yavapai-Apache Nation in the Verde River Valley in Arizona. This statement is made on behalf of the 19 Member Tribes of the Inter-Tribal Council of Arizona.

More than half of all Reservation lands (25,000,000 acres) and half of the American Indian Reservation population in the United States are in Arizona. Generally, there are few non-Indian residents on Reservations in Arizona.

This hearing is about whether the United States will honor its sacred word to the Indian Nations: to respect and protect the sovereignty of our permanent Tribal homelands.

The United States has given its word on countless occasions in order to secure treaties and agreements with us. Somehow, because of the passage of time, or politics, or economic convenience or outright racisms, we are repeatedly required to remind the U.S. of its sacred word.

To the American Indian Tribes and Nations, our word, and that of the United States, never gets too old to keep.

I. Origin of Sovereignty

The origin of the law of sovereignty is the same for all nations. Under international law and the Law of Nations, it is the vital principal upon which the United States Constitution and the Treaties with American Indian Nations were built — the right to govern our affairs within the boundaries of our respective nations. The United States and our Nation each have the power to govern our citizens through the adoption of our governing documents.

4205 North 7th Avenue • Suite 200 • Phoenix, Arizona 85013 • (602) 248-0071 • Fax (602) 248-0080

Only within the specific context of this history can this body of law be adequately understood and interpreted.

A. 1492 to 1778: Early Principles Development

The Constitution of the United States resulted from the composite experience of the original Thirteen Colonies and the scholars of the day. The language and structure of significant sections exist due to the experience of the Colonies with foreign nations and Indian Tribes.

"Foreign Nations" and "Indian Nations" or "Tribes" were commonly used interchangeably, with the former term encompassing the latter term, but not the antithesis. During the drafting of the Constitution, separate clauses were drafted to describe the nations by location. Those which did not originate on the continent were "foreign," and those which did were Indian. Even after the distinction, the founders occasionally used "foreign" as encompassing Indian Tribes.

For nearly 500 years the Indian Tribes of this continent have transacted business as sovereigns with foreign nations. The nations of Europe and the United States dealt with the Indian Nations as sovereigns, created alliances with them in times of war, and entered into treaties with them to resolve questions concerning war, territory and jurisdiction.

These countries included Great Britain, Holland, Mexico, Russia, Spain, France and the United States of America. "The first mention of a European nation developing a treaty ... with the Indian Tribes to secure Indian consent to cessions of land or changes of political status was made in 1532 by Franciscus de Victoria."[1] "The idea that land should be acquired from Indians by treaty involved three assumptions: (1) that both parties to the treaty are sovereign; (2) that the Indian Tribe has a transferrable title, of some sort, to the land in question; and (3) that the acquisition of Indian lands could not safely be left to individual Colonists but must be controlled as a governmental monopoly."[2] [3] [4]

B. The Union Under the Articles of Confederation

After the Declaration of Independence, the states feared that the foreign governments, such as France, Britain or Spain, might attempt to form coalitions with the Indian Tribes or other states to defeat the Colonies. Major concepts to deal with these problems were embodied in the language of the Articles of Confederation, the Northwest Ordinance and the Delaware Treaty. Those concepts eventually found their way into the Constitution, the Trade and Intercourse Acts and the Treaties with foreign nations and the Tribes. Included were, *inter alia*, the exclusive power in the federal government to wage war, make treaties, deal with foreign policy (including Indians), and to regulate the property of the country.[5]

Under the Confederation, the Northwest Ordinance reflected the first Congressional policy of the United States toward Indian affairs.

> The utmost good faith shall always be observed towards the Indians; their lands and properties shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them and for preserving peace and friendship with them.[6]

This was an assertion of ". Congressional authority in Indian relations in the face of the casual flouting of that authority by states such as Georgia and North Carolina, which continued to make both formal treaties and unauthorized encroachments on Indian lands within their boundaries. By itself, the Ordinance could not settle the conflict, but it did establish a statement of basic policy ... of Indian rights and Federal authority ..."[7]

The national government had legal but no practical enforcement powers. A number of states attempted to dominate or tax trade, adversely to other states,[8] and to seize territories in the West.[9] Others had deliberately and repeatedly violated treaties made by the United States with foreign nations and Indian Tribes.[10] Support grew for the adoption of a new Constitution which would enable the United States government to enforce its authority over the states to levy taxes, make war, deal exclusively with the foreign and Indian nations, to govern the entry into the Union of new states,[11] and to prevent state alliances, control of trade, and seizure of western lands.

The relationship of the Indian Tribes to the Federal and state governments and to foreign nations played a decisive and pervasive role in the framing of many provisions. By the time the drafting of our present Constitution was concluded, it had become an accepted principle that the Federal government, and not the states, should be the only government permitted to engage in wars, to make treaties and to regulate commerce. Encompassed in all three of these principles was the exclusive authority of the United States in all dealings with the Indian Tribes.

The concept that federal power under the Constitution would be from the people and not the states was adopted. The Constitution originating in the people instead of the states was also developed and assisted in the ultimate establishment of the Supremacy Clause. With the exclusive power of the national government under the war and treaty powers of the President and the power of the Senate to ratify treaties, the language which resulted, "regulate commerce with foreign nations, and among the several states and with the Indian Tribes," was considered sufficient to exclusively vest in the Federal government all manner of dealings with Indian Tribes.

Certain delegates to the Convention proposed a Judiciary composed of a Federal Supreme Court with mere appellate jurisdiction from state courts.[12] It was urged that appellate jurisdiction was sufficient in all cases of the first instance and that a Federal Judiciary was an unnecessary encroachment upon the jurisdiction of the states.[13] This issue was resolved against the state jurisdiction, in favor of a Federal Supreme Court with such other Federal Judiciary as was deemed advisable by Congress, with jurisdiction over the Constitution, treaties and laws of the Nation.

C. After the Constitution, 1788-1888.

The Constitution was ratified on June 21, 1788. The Indian Tribes of the Western Hemisphere were still recognized to be full sovereigns capable of making war, compacts and treaties with other countries and the United States. On the same day, the states of the United States were divested of all elements of sovereignty dealing with the same subject matter.

Congress began to legislate in the area of Indian affairs by the adoption of the Trade and Intercourse Acts, which maintained at all times the exclusive nature of the federal authority over Indian affairs. In 1790, at the request of President George Washington, Congress adopted an Intercourse Act which included the

restriction that title to Indian land could not be affected by any person or state without the authority of the United States.[14] In 1802, at the request of President Thomas Jefferson, Congress adopted an Intercourse Act defining the jurisdiction and laws of the United States as to be exclusive within Indian territory. The Act provided that laws of the states and territories operated against all persons outside Indian territory, and repeated the rule that states could not deal in any manner with an Indian Tribe or affect the title to any Indian property.[15] The Intercourse Act of June 30, 1834 codified previous trade and intercourse acts.[16] It confirmed the concept of exclusive Federal jurisdiction over Indian Tribes and Indian property.[17] In 1878 Congress confirmed that the exclusive rule of Federal jurisdiction over Indian Tribes and their property within Indian country was to be applied to all territories and adopted "The Law Common to All Territories."[18]

The right of Indian Tribes to govern the activities within their own territories has been recognized for over 500 years. Spain made treaties with the Indian Nations of the west under the Law of Nations. Britain, France, Russia, the United States and Mexico followed in this tradition. In the Southwest, Congress, as a condition precedent, described the specific conditions under which the States, including Arizona and New Mexico, would be permitted to enter the Union. To remove any implication of a state claim under the Constitutional Property Clause, Congress required in the Enabling Acts that the States of Arizona and New Mexico specifically disclaim all right, title and interest in certain federal lands and lands owned or held by an Indian or Indian Tribes.[19]

In addition, Congress required a number of other provisions for the benefit of Indians. It specifically precluded the States of New Mexico and Arizona from taxing Indians or Indian lands within Indian country.

Finally, for the benefit of the Indians and to specifically confirm the policy which has existed from the time of the Articles of Confederation to this date, but which had been frequently frustrated by illegal intrusions by other states, Congress specifically required the States of New Mexico and Arizona to refrain from exercising any **jurisdiction or control over Indian Tribes or their property until the title to that property was extinguished** and required the states to acknowledge that the absolute jurisdiction, which all parties understood to be **exclusive**, rested with Congress. Thus, the Senate Report on Statehood for New Mexico and Arizona provided:

> A final difference in the bills which your committee wishes to call attention refers to more careful **safeguarding of the rights of Indians** ... It is believed that the words inserted by the Senate Bill would more effectively provide against the introduction of liquor in the territory owned by these Indians and **remove any uncertainty as to their lands being Indian country under existing laws**.[20]
>
> * * *
>
> These changes have been inserted to safeguard the rights of any Indians who may have acquired title to their lands from a prior sovereignty, thus effectually preventing their taxation

Subject to these conditions, and as a result of the compliance with these conditions, Arizona and New Mexico were granted entry into the Union specifically subject to the provisions of the Enabling Act

D. Federal, Tribal, State Jurisdictions: 1912 to 1983

Congress has continued to legislate in the area of Indian affairs In 1934 it adopted the Indian Reorganization Act,[21] which, *inter alia*, acknowledged the power of Indian Tribes to veto the attempted disposition, lease or other assignment of Indian lands by the United States without Tribal permission All Arizona Tribes, with the exception of the Navajo Nation, have adopted constitutions approved by the Secretary of Interior confirming that power.[22]

In 1953 Congress passed Public Law 280,[23] and in 1968 the Indian Civil Rihts Act[24] Both Acts expressly retain exclusive Federal jurisdiction over Tribes

E. The Proper Rule for Review and Construction of Statutes Affecting Indians

The settled principles governing resolution of this case are not new, for the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history "[25]

Federally recognized Indian Tribes exercise many of the characteristics of a totally immune sovereign, including immunity from suit absent the Tribe's consent and the consent of Congress to waive such Tribal immunity [26] Any consent by Congress to waive Tribal immunity from suit must be expressed and is never to be implied.[27]

Although traditional notions of Tribal sovereignty, first enunciated in *Worchester v. Georgia*[28] have been modified by this Court "where essential Tribal relations were not involved and where the rights of Indians would not be jeopardized,"[29] "it would vastly oversimplify the problem to say that nothing remains in the notion that Reservation Indians are a separate people to whom State jurisdiction may not extend "[30] Thus, it is important to recognize that "Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[31]

It has been recognized, without exception since the era of the Marshall Court, that Indian treaties and legislation are to be liberally construed in order to further Indian interests [32] Moreover, in this instance, the Treaty expressly dictates a "liberal construction, **at all times** and in all places, to the end that the Government of the United States shall so legislate and act as to secure the **permanent** prosperity and happiness of said Indians."[33]

In *Washington v. Yakima Indian Nation*,[34] the Court indicated that in the absence of a repeal, Washington's constitutional disclaimers were "organic law disclaimers of [state] jurisdiction over Indian country " Moreover, the Court went on to quote from a House Report discussing the effect of such disclaimers

> According to this report accompanying H.R. 1063 (the House version of Pub. L. 280) '[e]xamination of the federal statutes and state constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of **jurisdiction**. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington.'[35]

That the disclaimers are in fact barriers to state jurisdiction over Tribes and Reservation property was again made clear in *McClanahan*:

> Congress has consistently acted upon the assumption that the states lacked **jurisdiction** over Navajos living on the Reservation. Thus, when Arizona entered the Union, its entry was expressly conditioned on the promise that the state would 'forever disclaim all right and title to [Indian lands] ... and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain under the absolute jurisdiction and control of the Congress of the United States.'[36]

Although the United States is a newcomer to the west, it also has recognized the sovereign right of Indian nations within Spanish and Mexican territories by multiple treaties. In the Southwest, treaties made between Mexico and the United States required the United States to recognize and honor earlier commitments made to Tribes by Spain and Mexico.

The treaties of Guadalupe Hidalgo, the Gadsen Treaty and the Treaties with the Apache Nation and Navajo Nation, the United States and Tribal Constitutions govern the relationship of the United States and Tribes in Arizona. Treaties are the supreme law of the land under the Constitution.

Over two centuries, fueled by greed and racism, our Tribes have suffered repeated attacks. Many would subject us to suits in State and Federal Courts. For sure, the purpose is to exhaust and destroy us.

The United States Supreme Court has said that the power to regulate is the power to destroy.[37] The concept of a state vesting any tribunal with the power to adjudge, enforce or extinguish rights and duties is built upon the fundamental concept of power.[38]

II. The Exercise of Tribal Sovereignty

The Tribes in Arizona have extensive administrative and judicial systems supported by codes, ordinances and rules of procedures governing substantially all areas of civil concern. These include: tribal membership, marriage, probate, child custody, contract (including secured transactions), employment rights, health care, environmental enforcement, wildlife and recreation, taxation, leasing, licensing and permitting, gaming and tort claims.

Anyone who is not a member of an Arizona Tribe, who wishes to enter a reservation for business or personal reasons can inform and avail himself of the rights and remedies under Tribal law. In addition, the United States Code, and Code of Federal Regulations set forth additional requirements for contracts,[39] leases and permits, and trading within federal Indian Reservations. If additional regulation or legislation was thought to be needed, the Tribes, the U.S. Department of Interior or the U.S. Department of Justice would present proposed legislation to Congress.

The concept of a waiver of a sovereign power must be based upon a knowing and voluntary decision by each Tribe. Tribes voluntarily make specific limited waivers of sovereign immunity where it is deemed in their best interest to do so in contract negotiations.

Under the Federal and State Enabling Acts and the Constitutions of many western States, including Arizona, States are precluded from taxing Indians, Indian Tribes and Indian property.

Tribes must preserve their right to levy and collect taxes, which legal right and power is recognized in the Constitution of Tribes under the 1934 Indian Reorganization Act and the U S. Supreme Court.

The Supreme Court has set the parameters for Tribal-State agreements for this narrow field in which States are permitted to tax non-Indian sales on Reservations. Congress should not dictate measures which would usurp the power of Tribes to deal with States on a government-to-government basis.

The concept of a waiver of a sovereign power must be based upon a knowing and voluntary decision by the Tribe.

F. S 1691

That brings me to comment on S 1691. The Arizona Tribes unanimously oppose this legislation in every form. It would violate the sacred word of the United States made to us over the last two centuries.

It relegates the governments of Tribes to the rights of private individuals, corporations and exposes our resources to exhaustion by involuntary litigation.

S 1691 violates the equal protection guarantee of the Constitution by placing Tribes in a subordinate class where actions arising under the laws of the United States could be brought in state court, but could not be removed to Federal court. No other person, or government, including non-citizens, would be similarly deprived.

A state could bring suit in state or federal court without waiving its rights under the Eleventh Amendment of the Constitution. Those few states who once claimed no immunity from suit, sought the adoption of the Eleventh Amendment because of the abuse they experienced to multiple suits in federal court. Thus, the waiver of sovereign immunity has been narrow and specific for federal and state purposes.

The United States assured Tribes that it would honor its trust responsibility through treaties, agreements, statutes, regulations and conduct. It promised to protect Tribes and their resources from exhaustion and disenfranchisement. S 1691 breaches all elements of that trust responsibility.

As in the 1950's termination era of Klamath, Paiute and Menominee, which resulted in disaster, the relegation of Tribes to private persons or corporations and the waiver of sovereign immunity from suit in S 1691 is yet another attack on the essence of sovereignty of American Indian Tribes and Nations.

Surely, it can not be too late in the day to honor the Sacred Word of the United States.

CITATIONS

1. *F. Cohen, Federal Indian Law*, 46 (1942), hereafter "Cohen," citing *Victoria, De Indis et De jure belli relectiones* (trans. by J.P. Bate, 1917), 1557 sec. 2, title 6,7.

2. *Cohen, supra*, at 47

3. *Delaware Indian Treaty*, 7 Stat. 13 (1778) with the United States under the Articles of Confederation, W. Washburn, *The American Indian and the United* States, Vol III, 2263. This was the first treaty made by the United States under the Articles of Confederation.

4. *Kappler, Indian Affairs, Laws & Treaties*, Volumes I through VII (2d Ed.) *See* specifically, *Treaty with the Apaches*, July 1, 1852. 10 Stat 979, 981, Articles I, III, VIII and IX. *See also*, *Treaty with the Navajo Nation*, June 1, 1868, 15 Stat. 667 (J.A. 296-306).

5. *See* Article 9, Articles of Confederation (1778).

6. Northwest Ordinance, July 13, 1787, 1 Stat. 51, Article III.

7. *The American Indian and the United States*, *supra*, Volume 3, page 2144.

8. J. Madison, *Nates of Debates in the Federal Convention of 1787*, "Preface to Debates in the Convention: A Sketch Never Finished Nor Applied," at 14 (hereinafter referred to as "*Madison Notes*."

9. J. Madison, *Journal of the Federal Convention*, edited by E. H. Scott (1898), 33 (hereinafter referred to as *Madison Journal*.

10. *Madison Notes*, at 14.

11. *Madison Journal*, at 32, 51.

12. *Madison Journal*, at 67, 68, 164.

13. *Madison Notes*, at 71.

14. 1 Stat. 137, 138 (1790).

15. 2 Stat. 139, 147 (1802).

16. Act of June 30, 1834, 4 Stat 729 (1834).

17. *Id* at § 25.

18. Revised Statutes of 1878, Title XXIII, Chapter 1, Section 1839; *Kappler, Indian Affairs and Treaties*, Vol. 1, p. 3 (2d. ed.)

19. Hearings on Statehood for New Mexico and Arizona, Before the House of Representatives, Committee on the Territories, 61st Congress, 2nd Sess. at 5,11 (January 12th and 13th, 1910). *See also*, letter from the Office of the Governor of the State of Arizona, Richard E. Sloan, dated December 22, 1909 to Honorable Edward L. Hamilton, Chairman, Committee on Territories, House of Representatives, Washington, DC.

20. S. Rep. No. 454, 61st Congress, 2nd Sess. at 31, 32 (1910).

21 48 Stat. 984, § 16.

22 T.A. at B, E

23 Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

24 Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 77.

25 *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olsen*, 324 U.S. 786, 789 (1945)

26 *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 167 (1977); *Santa Clara Pueblo v. Marinez*, 436 U.S. 49, 58 (1978)

27. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United State Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

28. 31 U.S. (6 Pet.) 515 (1832).

29. *Williams v. Lee*, 358 U.S. 217, 219 (1959).

30. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 146, 170 (1973)

31. *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

32. *See Bryan v. Itasca Conty*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

33. Treaty with the Apaches, Article XI (emphasis added).

34. 439 U.S. 463, 474 (1979).

35. *Id.*, at 481, *quoting* H.R. Rep. 848, 83rd Cong., 1st Sess. 6 (1953) (emphasis added)

36. *McClanahan*, 411 U.S. at 175 (emphasis added).

37. *See McCulloch v. Maryland*, 4 Wheat. 316 (1810).

38 *Pennoyer v. Neff*, 95 U.S. 714 (1877), *see Osborn v. Bank of the United States v. Planters Bank*, 9 Wheat 904 (1824); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885); *Textile Workers Union v. Lincoln Mills*, 335 U.S. 448 (1957).

39. 25 U.S.C. § 81.

TESTIMONY OF REID PEYTON CHAMBERS

Before the

Senate Committee on Indian Affairs

on

Tribal Sovereign Immunity
in tribal contracts and concerning
collection of state retail taxes

March 11, 1998

SUMMARY OF TESTIMONY

Reid Peyton Chambers

- The doctrine of tribal sovereign immunity has been repeatedly recognized by the Supreme Court.

- It is not a feudal or anachronistic legal concept but a necessary protection for tribal self-government.

- Despite the progress of some tribes, Indians remain the most deprived and isolated minority group in the United States.

- Allowing claims for money damages against Indian Tribal Governments in state and federal courts will destroy the ability of Tribal governments to render necessary services to their people.

- S. 1691 bill would impose significant new burdens on already overburdened federal courts in states with large Indian populations.

- S. 1691 would waive tribal sovereign immunity in state courts and apply state law to tribes, contrary to two centuries of federal Indian policy.

- States have not waived their own sovereign immunity to the extent Congress would waive tribal immunity under S.1691.

  -- States only allow suits against themselves in their own courts;

  -- States limit the extent of their liability often to $100,000 or to the amount of their insurance.

- Tribes contracting with individuals or corporations often waive sovereign immunity but only within negotiated limits.

- Many tribal courts allow suits against tribes or their officers, but only in tribal courts, just as states allow such suits only in state courts.

- Most states have negotiated compacts with tribes on the collection of various state taxes. Many of these recognize the need for tribal economic development and foster it. S. 1691 would undo these compacts creating chaos and litigation.

- S. 1691 should not be enacted.

Mr. Chairman and members of the Committee, I am Reid Peyton Chambers, a partner in the law firm of Sonosky, Chambers, Sachse & Endreson, Suite 1000, 1250 Eye Street, N.W., Washington, D.C. 20005, (202) 682-0240. Our firm represents several dozen Indian tribes and tribal organizations. Before founding this law firm 22 years ago with the late Marvin J. Sonosky and Harry R. Sachse, I served as a professor at UCLA Law School from 1970 to 1973, then as the Associate Solicitor for Indian Affairs (the chief Indian legal officer at the Interior Department) during the second Nixon and Ford Administrations from 1973 to 1976. I currently teach a seminar in Federal Indian Law at Georgetown Law School and Yale Law School. I appear today not on behalf of any client, but in response to the Committee's invitation to address the long-established doctrine of tribal sovereign immunity with respect to (1) contracts with Indian tribes and (2) collection of state retail taxes from Indian tribes.

Before turning to those two subjects, let me first describe the Indian tribal sovereign immunity doctrine. This is certainly no feudal or anachronistic legal concept. Rather, it is solidly anchored in federal law, forming an essential protection for tribes if they are to continue to devote their usually limited financial resources to providing vital health, education, housing and other services to their members.

Indian Sovereign Immunity

As a legal matter, the United States Supreme Court has repeatedly held that tribes are immune from suit. Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509-11 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940); Turner v. United States, 248 U.S. 354, 358 (1919). This immunity is not something granted to tribes by the federal or state government. Rather it is an inherent right of tribes as sovereigns. See e.g., Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 880 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982); United States v. Wheeler, 435 U.S. 313, 322-323 (1978). This has been so from the earliest days of the Republic, when Chief Justice John Marshall determined in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), tribes are "distinct, independent political communities, retaining their original natural rights." See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). In addition to Supreme Court precedent, tribal sovereign immunity has been uniformly recognized and applied throughout lower federal[1] and state[2] courts for more than a century.

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[1] See e.g. Makah Indian Tribe v. Verity, 910 F.2d 555, 557(9th Cir. 1990); Weeks Constr. Inc. v. Oglala Sioux Housing Auth., 797 F.2d 668, 670 (8th Cir. 1986); Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 771 (D.C. Cir. 1986); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344-45 (10th Cir. 1982); Bottomly v. Passamaquoddy Tribes, 599 F.2d 1061, 1064-1067 (1st Cir. 1979); Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520-21 (5th Cir. 1966); Haile v. Saunooke, 246 F.2d 293, 297 (4th Cir. 1957); Thebo v. Choctaw Tribe, 66 F. 372, 374-76 (8th Cir. 1895).

[2] See e.g. John v. Hoag, 500 N.Y.S.2d 950 (Sup. Ct. 1986); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977), Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (Ariz. 1968); Gavle v. Little Six, 555 N.W.2d 284 (Minn. 1996), petition for cert. filed, 65 U.S.L.W. 3639

Apart from the law, while tribes have made impressive progress toward economic self-sufficiency in recent years, it remains as true today as it was in 1970 when President Nixon issued his landmark Message to Congress on Indian Affairs that "[t]he first Americans -- the Indians -- are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement -- employment, income, education, health -- the condition of the Indian people ranks at the bottom."[3] Today, according to the Census Bureau, unemployment among Indians is nearly 15 percent, about triple the national average. The National Center for Education reports that more than one-third of Indian children are still high school dropouts. The suicide rate for Indians is nearly double that for all Americans, and alcoholism is six times as prevalent among Indians as among other Americans, according to the Indian Health Service.

The Report to the Legislature: Cigarette Tax Study prepared by the Washington State Cigarette Tax and Revenue Loss Advisory Committee in 1995 (hereinafter "Washington Report")[4] illustrates these conditions in one state. It reported as follows:

> The economic conditions of Indian tribes and their members in Washington, despite some improvements through the years, are still much worse than those of non-Indian citizens in the state and the nation. Tribal unemployment rates are significantly higher than both the national and Washington averages, per capita and household income for tribal members are significantly lower, and a much higher percentage of Indians are below the poverty level.
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> The unemployment rate in Washington in 1993 was approximately 7.5%, the national rate approximately 6.8%. The Bureau of Indian Affairs (Department of the Interior) reported an unemployment rate of 46% for Indian populations located on and adjacent to reservations in Washington for the same year.
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> The 1990 census reported average per capita income for the population as a whole at $14,420 for the United States, and $14,923 for the State of

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(U.S. Jan. 29, 1997) (No. 96-1215).

[3] Special Message to the Congress on Indian Affairs, July 8, 1970 (President Nixon).

[4] We have lodged a copy of this Report with the Committee.

> Washington. Average per capita income for Indians in the State of Washington, in stark contrast, ranged from a high of $9,815 to a low of $3,540. Household income showed a similar disparity. Median household income for Indians was just under $20,000; for the general population it was just over $30,000.
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> According to the 1990 census, 31.6% of Indian people were below the federal poverty level, compared to 13.1% of the population in general. . . ."

The Washington Report also found that:

> Health conditions for Indian people lag far behind those of the rest of the population. Life expectancy is shorter for Indian people. The overall mortality rate for the Indian population is significantly higher than for the rest of the population in every age group from birth through age 64. The rate for Indians is from one and one-half to two times as high in most age groups.
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> Adequate housing is also a problem for the tribes of Washington. Tribes need more units to provide sufficient housing, and need to make many improvements to upgrade substandard housing. The Bureau of Indian Affairs keeps records of housing units and new units needed. On at least 17 reservations the need is in hundreds of units. The total unfilled need is over 5,000 housing units for a population of under 70,000 people.

Id. at F-4-5 (footnotes omitted).

Given the widespread poverty that remains on most reservations and the enormous needs for health, education, law and order, housing and similar services, the sovereign immunity doctrine remains necessary to protect tribal governments against lawsuits which would otherwise drain tribal resources, and destroy tribes' ability to provide much needed services to their people. Modern tribes are using all their powers and resources to build tribal economies, improve the quality of life on their

reservations, and protect reservations' resources and environments -- matters of vital importance to all who live on or visit a reservation. Tribes could not do this absent the continuing commitment of Congress to the goals of self-determination and economic self-sufficiency. These have been the major and bipartisan goals of federal policy endorsed by every Congress and every President for the last thirty years.[5] These policies have worked over the last three decades to build stronger tribal governments and economies in recent decades. But continuing and pervasive poverty on most reservations attests that there is a long way still to go.

Claims for money damages go the heart of the tribal sovereign immunity doctrine. See Turner, supra; United States Fidelity, supra; American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985). In Martinez, for example, the Supreme Court expressed specific concern that allowing suits against tribes "would also impose serious financial burdens on already 'financially disadvantaged' tribes." 436 U.S. at 64 (citation omitted) The protection against money judgments which drain tribal resources is especially critical to tribes because the financial resources available to most tribes are very limited, leaving them far more susceptible to disruption by private lawsuits than a state government, or, of course, the United States If tribal sovereign immunity were broadly waived by Congress against the will of the tribes, tribal governments could be bankrupted, and tribes would be thwarted in their efforts to devote limited tribal resources to meeting vital needs on reservations. As President Reagan said in his message to Congress on Indian Affairs:

> This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

The waiver of tribal sovereign immunity, as proposed in the recently introduced bill S. 1691, would produce the opposite of President Reagan's policy.

One of the purported justifications for S. 1691 is the notion that the federal government and the several states have waived their sovereign immunity in their respective jurisdictions. However, upon closer inspection it will be quickly seen that most states have not abrogated their immunity to

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[5] See Presidential memorandum for the Heads of Executive Departments and Agencies, April 29, 1994 (President Clinton); Statement by the President: Indian Policy, the White House, January 24, 1983 (President Reagan); and Special Message to the Congress on Indian Affairs, [1970] Pub. Papers 564 (Nixon). Included in the self-determination policy is the "'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Indians, 480 U.S. 202, 216 (1987)(quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983)). As the Supreme Court has noted, Congress has enacted numerous statutes in furtherance of the self-determination policy. See, e.g., Mescalero Apache Tribe, 462 U.S. at 334-335 and n.17; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 and n.10, 149 (1980).

anything like the extent that S. 1691 would abrogate tribal immunity. S.1691 would not treat tribes similarly to other governments. Instead, it would convert them into "private, voluntary organizations," contrary to (then) Justice Rehnquist's opinion for a unanimous Supreme Court in United States v. Mazurie, 419 U.S. 544, 557 (1975).

To begin with, states have only waived their immunity for suits brought in their own courts, not in federal courts or tribal courts. In addition, although generalizations are difficult when speaking of the law of the several states, there are characteristics common to most states that show the continued strength of state sovereign immunity. These include: (1) state tort claim acts that explicitly retain immunity, subject to limited exceptions, (2) limits on the kinds of damages that can be recovered and limits on the amount of any damages recoverable, (3) limitations on liability only to the extent of insurance coverage, and (4) establishment of special state courts, commissions or boards as exclusive forums where claims against a state must be brought. The cumulative effect of these provisions is that many state statutes that appear to "scale back" their respective sovereign immunity are, in fact, more illusory than real.

For example, several states have retained immunity as a general rule, subject only to specified exceptions.[6] In addition, most states have retained immunity for discretionary functions.[7] Many states have also retained immunity for claims based on the intentional conduct of state officers or employees.[8] These areas represent significant sources of potential liability that remain immune from

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[6] See, e.g., Ala. Code §§ 11-47-190; Colo. Rev. Stat. §§ 24-10-105 et seq.; Del. Code Ann. tit. 10, §§ 4001 et seq.; 745 I.L.C.S. § 5/1; Me. Rev. Stat. Ann. tit. 14, § 8103; Mich. Comp. Laws §§ 691.1407; Miss. Code Ann. §§ 11-46-3,5; Mo. Rev. Stat. §§ 537.600 et seq.; N.J. Rev. Stat. §§ 59:2-1 et seq.; N.M. Stat. Ann. §§ 41-4-1 et seq.; Ohio Rev. Code Ann. §§ 2743.02; 42 Pa. Cons. Stat. §§ 8522; Tenn. Code Ann. § 29-20-201; Utah Code Ann. §§ 63-30-3; W. Va. Code §§ 29-12A-1 et seq.; Wyo. Stat. §§ 1-39-101 et seq.

[7] Alaska Stat. § 09.50.250(1); Ariz. Rev. Stat. Ann. § 12-820.01(B); Cal. Gov't Code § 820.2; Del. Code Ann. tit. 10, § 4001(1); Ga. Code Ann. § 36-33-2 (municipalities); Hawaii Rev. Stat. § 662-15(1); Idaho Code § 6-904(1); 745 I.L.C.S. § 10/2-201; Ind. Code § 34-4-16.5-3(6); Iowa Code § 670.4(3); Kan. Stat. Ann. § 75.6104(e); Ky. Rev. Stat. Ann. § 65.2003(3) (municipalities); La. Rev. Stat. Ann. § 9:2798.1(B); Me. Rev. Stat. Ann. tit. 14, § 8104-B(3); Mass. Gen. L. ch. 258, § 10(b); Minn. Stat. § 3.736(3)(b); Miss. Code Ann. § 11-46-9(c); Neb. Rev. Stat. § 81-8219(1)(a); Nev. Rev. Stat. § 41.032(2); N.J. Rev. Stat. § 59:2-3(a); N.D. Cent. Code § 32-12.1-03(3) (political subdivisions); Ohio Rev. Code Ann. § 2744.03(A)(3); Okla. Stat. Ann. tit. 51, § 155(5); 42 Pa. Cons. Stat. Ann. § 8546(3); S.C. Code Ann. § 15-78-60(5); Tenn. Code Ann. § 29-20-205(1); Tex. Civ. Prac. & Rem. Code Ann. § 101.056(2); Utah Code Ann. § 63-30-10(1); Vt. Stat. Ann. tit. 12, § 5601(e)(1).

[8] Alaska Stat. § 9.50.250(3); Ariz. Rev. Stat. Ann. § 12-820.02; Cal. Gov't Code § 815.3; Fla. Stat. § 768.28(9); Hawaii Rev. Stat. § 662-15(4); Idaho Code § 6-904(3); 745 I.L.C.S. §10/2-107; Mass. Gen. L. ch. 258, § 10(c); Miss. Code Ann. § 11-46-5; Neb. Rev. Stat.

suit under state law.

Moreover, a number of states have created special courts, commissions or compensation boards to hear claims against the state. In some states, special "courts of claim" hear cases brought against the state.[9] In most states, these courts have exclusive jurisdiction over claims against the state. Several other jurisdictions have established special "Boards of Claim" or "Compensation Commissions" to adjudicate such claims.[10] By reserving the right to determine the forum in which states face potential liability, a powerful advantage in the adjudication of the claim can be maintained.

Third, most states limit the kinds of damages that can be recovered and also limit the amount of any damages award. Several states have completely barred any recovery for punitive or exemplary damages.[11] A clear majority of states have also imposed statutory caps on the amount of basic compensatory damages an individual can recover from a state.[12] In these states, the maximum award

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§ 81-8219(1)(d); N.J. Rev. Stat. § 59:2-10; 42 Pa. Cons. Stat. Ann. § 8542(a)(2); S.C. Code Ann. § 15-78-60(17); Tenn. Code Ann. § 29-20-205(2); Tex. Civ. Prac. & Rem. Code Ann. § 101.057; Utah Code Ann. § 63-30-10(2); Vt. Stat. Ann. tit. 12, § 5601(e)(6); Wis. Stat. Ann. § 893.80(4).

[9] 705 I.L.C.S. §§ 505/1 et seq.; Mich. Comp. Laws § 600.6419; N.Y. Ct. Cl. Act §§ 1 et seq.; Ohio Rev. Code Ann. §§ 2743.01 et seq.; W. Va. Code §§ 14-2-1 et seq.

[10] Ala. Code §§ 41-9-60 et seq; Ark. Stat. Ann. §§ 19-10-201 et seq.; Conn. Gen. Stat. §§ 4-141 et seq.; Ga. Code Ann. §§ 28-5-60 et seq.; Ky. Rev. Stat. Ann. § 44.070; Neb. Rev. Stat. § 81-8211; N.C. Gen. Stat. § 143-291; S.D. Codified Laws Ann. §§ 21-32-1 et seq.; Tenn. Code Ann. §§ 9-8-301 et seq.

[11] Ariz. Rev. Stat. Ann. § 12-820.04; Cal. Gov't Code § 818; Colo. Rev. Stat. § 24-10-114(4); Hawaii Rev. Stat. § 662-2; Idaho Code § 6-918; Mass. Gen. L. ch. 258, § 2; Minn. Stat. § 3.736; Mo. Rev. Stat. § 537.610(3); Nev. Rev. Stat. § 41.035(1); N.H. Rev. Stat. Ann. § 507-B:4(II); N.M. Stat. Ann. § 41-4-19(B); Okla. Stat. tit. 51, § 154(B); Or. Rev. Stat. § 30.270(2); 42 Pa. Cons. Stat. § 8528(c) (listing available damages); Tex. Civ. Prac. & Rem. Code Ann. § 101.024; Utah Code Ann. § 63-30-22; W. Va. Code § 29-12A-7(a); Wis. Stat. Ann. § 893.80(3); Wyo. Stat. § 1-39-118(d).

[12] Ala. Code § 11-93-2 ($100,000 limit for governmental entities); Colo. Rev. Stat. § 24-10-114(1)(a) ($150,000 limit); Fla. Stat. Ann. § 768.28(5) ($100,000 limit per person; $200,000 limit for all claims arising out of the same occurrence); Idaho Code § 6-926 ($500,000 limit); 705 I.L.C.S. § 505/8(d) ($100,000 limit); Ind. Code § 34-4-16.5-4 ($300,000 limit); Kan. Stat. Ann. § 75-6105(a) ($500,000 limit); Ky. Rev. Stat. Ann. § 44.070(5) ($100,000 limit); La. Rev. Stat. Ann § 13:5106B(1) ($500,000 limit); Me. Rev. Stat. tit. 14, § 8105(1) ($300,000 limit); Md. Code Ann. State Govt. § 12-104(a) ($100,000 limit); Mass. Gen. L. ch. 258, § 2 ($100,000 limit); Minn. Stat. § 3.736(4)(a) ($300,000 limit for wrongful death); Miss. Code Ann. § 11-46-15(1) ($250,000 limit); Mo. Rev. Stat. § 537.610(2) ($100,000 limit); Mont. Code Ann. § 2-9-108(1)

ranges from as low as $50,000 to as high as $750,000. Nevertheless, the statutes as a whole average a maximum recovery well under $300,000.

Fourth, most states have authorized the purchase of liability insurance. In several of these states the effect of the statute is a waiver of sovereign immunity only to the extent of the insurance coverage.[13] This is another way states are able to control the extent of their liability.

Moreover, the Supreme Court has respected the right of states to determine where they may be sued. Thus, the Court has refused to infer that a state's waiver of its immunity operates as a waiver to suit in federal court, as opposed to only the state's courts. See, Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459 (1945). S. 1691 -- by permitting claims against tribes in state and federal courts -- would compel tribes to defend against claims in the courts of foreign sovereigns -- contrary to the treatment accorded states, and wholly at odds with established federal law and policy intended to foster tribal self-determination. See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

In conclusion, a basic premise for S. 1691 -- that states have "dramatically scaled back the doctrine of sovereign immunity" -- is simply not supported by the data. Most states retain significant portions of the doctrine as well as severely limiting the dollar amount that can be recovered when immunity is waived. In the limited circumstances where immunity is waived, states have done so on their own terms and in their own courts, knowing they have the ability to spread the ultimate cost of the waiver over a wide population base. The same is not even remotely true of Indian tribes; no tribe has the tax base or financial resources of a state. Thus, S. 1691 is a bill that would impose a kind of waiver of sovereign immunity incompatible with typical American jurisprudence on those sovereign entities least financially equipped to handle it. The bill, therefore, should not pass.

($750,000 limit per claim, $1,500,000 limit per occurrence); Neb. Rev. Stat. § 13-926(1) ($1,000,000 limit for political subdivisions); Nev. Rev. Stat. § 41.035(1) ($50,000 limit); N.H. Rev. Stat. Ann. § 507-B:4(I) ($150,000 limit); N.C. Gen. Stat. § 143-291 ($150,000 limit); N.D. Cent. Code § 32-12.1-03(2) ($250,000 limit per claim against political subdivisions); Okla. Stat. tit. 51, § 154(A)(2) ($100,000 limit); Or. Rev. Stat. § 30.270(1)(b) ($100,000 limit per claim); 42 Pa. Cons. Stat. § 8528(b) ($250,000 limit); R.I. Gen. Laws § 9-31-2 ($100,000 limit); S.C. Code Ann. § 15-78-120(a)(1) ($250,000 limit); Tex. Civ. Prac. & Rem. Code Ann. § 101.023(a) ($250,000 limit); Utah Code Ann. § 63-30-34(1) ($250,000 limit); Vt. Stat. Ann., tit. 12, § 5601(b) ($250,000 limit); Va. Code Ann. § 8.01-195.3 ($100,000 limit); Wis. Stat. Ann. § 893.80(3) ($50,000 limit); Wyo. Stat. § 1-39-118(a)(i) ($250,000 limit).

[13]See, e.g., Ark. Code Ann. § 21-9-301; Ga. Code Ann. § 33-24-51(b) (political subdivisions); Hawaii Rev. Stat. § 661-11; Idaho Code § 6-926; Me. Rev. Stat. Ann. tit. 14 § 8116; Miss. Code Ann. § 11-46-16; Mo. Rev. Stat. § 537.610; Neb. Rev. Stat. § 13-916 (political subdivisions); N.C. Gen. Stat. § 160A-485 (municipalities); S.D. Codified Laws Ann § 21-32-16; Tenn. Code Ann. § 29-20-311; Vt. Stat. Ann. tit. 29, § 1403 (municipalities).

Contracts with tribes

a. Contractual waivers of sovereign immunity.

Under existing law, the immunity doctrine leaves it up to tribes to determine when and to what extent they will waive their immunity from suit when they enter into commercial and other contracts. This is a major component of the federal policy of tribal self-determination. Congress should not abridge that policy, and unilaterally waive tribal immunity in an across the board as proposed in S. 1691.

The tribal sovereign immunity doctrine is hardly a secret. Businesses and individuals dealing with tribes are well aware of tribal sovereign immunity. Some, like my law firm, simply deal with tribes without seeking waivers of immunity. I might add our success in collecting fees seems to be the envy of most of my friends in corporate law firms. The truth is that almost all tribes pay their contractual obligations in a full and timely fashion.

Other businesses and individuals do seek specific waivers of immunity before they will do business with tribes. In my experience, tribes are usually willing to negotiate a waiver where they determine that the benefits of a commercial or other transaction for the tribe justify the waiver. Tribes generally recognize that non-Indian companies will not make multimillion dollar capital investments on tribal lands without some adequate recourse to enforce the tribe's obligations. The most common approach in my experience is for tribes to agree to binding arbitration, ensuring specific performance of a contract, usually with relief limited to the assets of the particular project at hand. Tribes often also establish enterprises separate from the tribal government, including housing authorities, that waive immunity in their charters or otherwise.

b. Tribal waivers of sovereign immunity for suits in their own courts.

In addition, some tribes have authorized equitable and declaratory relief in tribal courts against tribal officers acting contrary to their legal obligations. Decisions of various tribal courts published in the Indian Law Reporter are indicative of instances in which tribal courts have determined that a tribe has waived immunity to permit suit to proceed in the tribe's own court system.[14] Several

[14] Blaze Construction, Inc. v. Crownpoint Institute of Technology, 24 Ind. L. Rep. 6254 (Nav. Sup. Ct. 1997) (holding that statute in force at time of contract did not validly cloak tribal vocational school in Navajo Nation's immunity); Jones v. Chitimacha Tribe of Louisiana, 23 Ind. L. Rep. 6225 (Chitimacha Ct. App. 1996) (finding a limited waiver of sovereign immunity in tribal/state compact); Pazienza v. Mashantucket Pequot Gaming Enterprise, 24 Ind. L. Rep. 6219 (Mash. Peq. Tr. Ct. 1996) (holding Tribe's sovereign immunity statute waived immunity for common law invasion of privacy action, but not for strict liability action); Wells v. Fort Berthold Community College, 24 Ind. L. Rep. 6157 (Ft. Berthold Tr. Ct. 1997) (stating that "sue and be sued," clause in charter of tribal community college was a valid waiver of sovereign immunity).

decisions hold that immunity was waived in the tribal constitution or in the tribal statutes,[15] while others have found a waiver in the Indian Civil Rights Act.[16]

Where Indian tribes have enacted ordinances expressly waiving sovereign immunity, tribal courts have sought to give effect to both the purpose and policy of the ordinance. For example, in Bauer v. Mashantucket Pequot Gaming Enterprise,[17] the tribal appellate court held that the tribal ordinance waived the tribal gaming enterprise's immunity from personal injury suits, and that the lower court had erred in dismissing plaintiff's claim on the ground that she had misnamed the tribal gaming enterprise in her complaint. And in Raymond v. Navajo Agricultural Products Industry, the Supreme Court of the Navajo Nation examined each of the four exemptions from sovereign immunity provided by the Navajo Sovereign Immunity Act to determine whether they applied to the employment-related claims brought by plaintiff against a tribal entity. While holding that none of the exemptions applied, the Court explained that plaintiff should have pursued the administrative remedy provided under the Navajo Preference in Employment Act, which authorized an appeal to the tribal court.

These decisions also show that a number of the tribal courts have adopted as tribal law the remedy that the Supreme Court has made available for claimed violations of federal law in Ex parte Young, 209 U.S. 123 (1908). The Young doctrine authorizes actions for prospective injunctive relief against government officials for claimed violations of federal law by declaring that actions of government officials that are beyond the scope of their authority are not actions of the sovereign, and that therefore such actions are not barred by sovereign immunity. The Young doctrine has been applied by a number of tribal courts as a remedy for claimed violations of tribal law, thus avoiding immunity in suits against officials in the same manner as do the federal courts.[18] Applying the same

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[15] See, e.g., Blaze Construction, Inc. v. Crownpoint Institute of Technology, 24 Ind. L. Rep. 6254 (Nav. Sup. Ct. 1997); Jones v. Chitimacha Tribe of Louisiana, 23 Ind. L. Rep. 6225 (Chitimacha Ct. App. 1996); Pazienza v. Mashantucket Pequot Gaming Enterprise, 24 Ind. L. Rep. 6219 (Mash. Peq. Tr. Ct. 1996); Wells v. Fort Berthold Community College, 24 Ind. L. Rep. 6157 (Ft. Berthold Tr. Ct. 1997).

[16] See, e.g., Works v. Fallon Paiute-Shoshone Tribe, 24 Ind. L. Rep. 6033 (Intertr. Ct. App. Nev. 1997); Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt. Mt. Tr. Ct. 1991); Oglala Sioux Tribal Personnel Board v. Red Shirt, 16 Indian L. Rep. 6052 (Ogl. Sx. Tr. Ct. App.1983).

[17] 22 Indian L. Rep. 6145 (Mash. Peq. Ct. App. 1994).

[18] See, e.g., Combrink v. Allen, 20 Indian L. Rep. 6029, 6030 (Ct. Ind. App., Tonkawa 1993)(holding sovereign immunity does not bar petition for mandamus directing president to comply with tribal law where president acted beyond the scope of her authority); Wells, Jr. v. Blaine, Jr., et al., 19 Indian L. Rep. 6035-36 (N. Plns. Intertr. Ct. App. 1991)(holding that the doctrine of sovereign immunity does not bar actions against tribal officials who have acted outside the scope of their authority); accord Lovermi v. Miccosukee Tribe of Indians of Florida, 23 Indian

doctrine, tribal courts have dismissed claims against tribal officials in the absence of allegations that the defendants acted beyond the scope of their authority,[19] and have recognized tribal immunity when an action brought against tribal officials is in reality an action against the sovereign.[20] In sum, the tribal courts have, through the development of tribal common law, made new remedies available to litigants whose claims would otherwise be barred by immunity. The important thing is that these limitations on tribal immunity, like contractual limitations, have been made by the tribes themselves, tailored to tribal finances and particularly not imposed in a one-size fits all manner from above

c. The effect of S. 1691 would be devastating to Tribes' federal Indian policy and the federal court systems.

S. 1691 proposes to replace contractual provisions, negotiated waivers of tribal immunity, arbitration, and tribal court consideration of these questions with a mandatory waiver of all tribes' immunity to permit adjudications of all contract claims against them in federal court. This proposal, however, ignores the fact that federal courts ordinarily do not have federal question jurisdiction to adjudicate contract or lease disputes involving Indian tribes and commercial partners. E.g., Gila River Indian Community v. Henningson, 626 F.2d 708 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); Morongo Band v. California State Board of Equalization, 858 F.2d 1376, 1385-1386 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). In addition, even if a tribe enters into a contract with an out-of-state company or individual, two federal courts of appeal have held that tribes are not "citizens" of a state for purposes of federal diversity jurisdiction. E.g., Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993); Standing Rock Sioux Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974). Thus, if Congress does decide to burden the federal courts with the additional jurisdiction proposed in S. 1691, it may not be within their jurisdiction under Article III of the United States Constitution.

Apart from this constitutional defect, Congress should bear in mind the recent admonition from the Honorable J. Clifford Wallace, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit that if the controversies now filed in tribal courts (or, presumably, decided by arbitration) were

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L. Rep. 6090 (Micc. Tr. Ct. 1996); Committee for Better Tribal Government, et al., v. Southern Ute Election Board, et al., 17 Indian L. Rep. 6095, 6097 (S. Ute Tr. Ct. 1990).

[19] See, e.g., Lovermi v. Miccosukee Tribe of Indians of Florida, 23 Indian L. Rep. 6090 (Micc. Tr. Ct. 1996); Committee for Better Tribal Government, et al. v. Southern Ute Election Board, et al., 17 Indian L. Rep. 6095, 6097 (S. Ute Tr. Ct. 1990); accord Sulcer v. Barrett, Jr., 17 Indian L. Rep. 6138 (C.B. Pot. Sup. Ct.1990).

[20] See GNS, Inc. v. Blackhawk, 24 Ind. L. Rep. 6260 (Winn. Sup. Ct. 1997); Clement v. LeCompte, 22 Ind. L. Rep. 6111 (Chy. R. Sx. Ct. App. 1994); Sulcer v. Barrett, Jr., 17 Indian L. Rep. 6138, 6139 (C.B. Pot. Sup. Ct. 1990); accord Day v. Hopi Election Board, 16 Indian L. Rep. 6057, 6059 (Hopi Tr. Ct. 1988)(holding that defendants were not liable for money damages because the doctrine of sovereign immunity bars any suit "that could potentially reach into the public treasury").

filed in federal courts:

> [the federal courts] could not absorb them with our current resources. Thus, we should respect and appreciate the tribal courts for the tremendous amount of work they do to resolve disputes. As the legal market scrambles for alternative forums in which to pursue claims and resolve conflicts, due largely to the limited capacity of the federal courts as currently staffed, we should not take for granted, but rather honor and appreciate, the tribal forums that shoulder such a significant burden.

Wallace, A New Era of Federal-Tribal Court Cooperation, 79 Judicature No. 3 (1995). It is apparent from Chief Judge Wallace's statement that the federal courts are not ready and able to hear all of the contract cases that will be filed if tribal sovereign immunity were waived for contract claims, even if these claims were within the Article III jurisdiction of federal courts.

S.1691 also would waive tribal sovereign immunity to permit tribes to be sued without their consent in state courts and for state substantive law to apply to determine such adjudications. This radical proposal would stand more than two centuries of federal Indian policy on its head, replacing self-determination with a policy that would "result in the undermining or destruction of . . . tribal governments," Bryan v. Itasca County, 426 U.S. 373, 387-388 (1976), and give states unprecedented power in an area -- commerce with Indian Tribes -- that the Constitution itself confers exclusively upon the federal government. E.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985).

It has been clear since the earliest days of the Republic that under the United States Constitution states and state courts do not have jurisdiction over Indians on reservations, much less over tribal governments themselves. This principle has been well established at least since Chief Justice Marshall's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), holding that the law of the State of Georgia has no force within the boundaries of the Cherokee Nation. "The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress." 31 U.S. (6. Pet.) at 561. See also Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); The New York Indians, 72 U.S. (5 Wall.) 761 (1867); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

The underpinnings of this doctrine are in the Constitution itself in the treaty making power granted the President with the advice and consent of the Senate in Article II § 2, cl.2, and the power over commerce with Indian tribes granted to Congress in Article I § 8, cl 3. The absence of state jurisdiction over tribes is also part of the recognition of the inherent sovereignty of Indian tribes, Worcester v. Georgia, supra at 559, Cherokee Nation v. Georgia, supra, at 16, and protection of the

tribes from governmental regulation by the states[21] so that the tribes can remain "a separate people with the power of regulating their internal and social relations," United States v. Kagama, 118 U.S. 375, 382 (1886), with the power to "make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959). Protecting these rights are core purposes of the modern self-determination policy. As the Court explained in Warren Trading Post v. Arizona Tax Comm., 380 U.S. 685, 686-87 (1965), "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." In sum, as the Supreme Court concluded in Rice v. Olson, 324 U.S. 786, 789 (1945), "[t]he policy of leaving Indians free from state jurisdiction and control is rooted deeply in the Nation's history" (citations omitted).

Even in the rare instances where Congress has authorized state jurisdiction over reservation Indians, as with Public Law 280 enacted in 1953, 25 U.S.C. § 1322, it has determined not to confer "state jurisdiction over the tribes themselves." Bryan v. Itasca County, 426 U.S. at 389; Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 892 (1986). The proposal in S. 1691 to confer jurisdiction on state courts over tribes without their consent would thus be an unprecedented and rank overturning of more than two centuries of federal Indian policy.

Cigarette and other sales taxes

The Supreme Court has adopted a per se rule that, except where authorized by Congress, tribes and tribal members on reservations are exempt from state sales and other taxes. California v. Cabazon Band, 480 U.S. 202, 215, n. 17 (1987).

The rule regarding state taxation of commercial transactions between Indian sellers and non-Indian buyers is more complex. In these cases, the courts have engaged in "a particularized inquiry into the nature of the state, federal and tribal interests at stake, . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). No talismanic or certain outcome follows from application of this test. It is by its very nature dependent on the specific facts presented in the case concerning the impacts of a state tax on federal and tribal interests and on the purposes of the particular state tax.

Employing principles of preemption and the balancing of tribal, state, and federal interests enunciated in Bracker, the Supreme Court has held in a number of cases that states cannot tax or regulate the on-reservation activities of non-Indians engaged in transactions with tribes or their members. See e.g., California v. Cabazon Band, 480 U.S. 202 (1987) (non-Indians entering Reservation to attend tribal gaming establishment not subject to state regulation); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 846 (1982) (non-Indian contractors building school

[21] "Because of the local ill feeling, the people of the States where they [Indians] are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886). See also Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 846 (1982).

on reservation not subject to state gross receipts tax); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian logger harvesting Indian-owned timber not subject to state license and fuel taxes); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 686-87 (1965) (state gross receipts tax not applicable to non-Indian business).

In sales of cigarettes, if the incidence of the tax falls on the non-Indian purchaser, the Supreme Court has held that the state tax is lawful, even though the sale took place on an Indian Reservation and that tribes may be required to make reasonable efforts to assist in collection of the tax. New York Tax Dep't. v. Milhelm Attea & Bros., 512 U.S. ___, 129 L.Ed.2d 52 (1994); Confederated Colville Tribes v. Washington, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). The Tribes have bitterly opposed this result, because it either eliminates their much needed ability to tax the transactions themselves, or results in double taxation by both tribes and states, which ends their ability to compete. Nevertheless, most states and tribes have resolved their disputes about application of state sales and other taxes by entering into intergovernmental agreements. This has been true for various sales and excise taxes, including those dealing with cigarettes, motor fuels and liquor. I describe below the agreements that have been made, relying on two studies -- the first by the Arizona Legislative Council, State-Tribal Approaches Regarding Taxation & Economic Development (1995) (hereafter "Arizona Report"), and second the "Washington Report" discussed earlier in my testimony, especially a monograph prepared by my partner, Harry R. Sachse, and Puyallup tribal attorney, John Howard Bell that is Appendix J to that Report.[22]

Most of these agreements actually follow the pattern of the major Supreme Court cigarette tax cases by (1) exempting all on-reservation sales to Indians from state tax, but agreeing to imposition and collection of taxes on sales to non-Indians, or (2) agreeing on the part of the tribe to impose the same tax as that imposed by the state, and sharing this "single tax" between the tribe and the state on a prearranged basis, reflecting the percentage of the sales to Indians as contrasted to non-Indians. Two states have actually agreed that tribes may keep all the tax revenues from the "single tax," whether the on-reservation sales are to Indians or non-Indians. Four states have exempted all on-reservation sales from state taxation. We provide the details of these agreements below.

a. Agreements exempting all on-reservation sales by Indian sellers from state taxes

Mississippi and New Mexico exempt all cigarette sales on Reservations in their state by Indian sellers from state sales taxes, where the Tribe imposes its own tax whether the sale is to Indians or non-Indians. Miss Code Ann. § 27-65-215; N.M. Stat. Ann. § 7-12-4. Florida allows the Seminole Tribe and tribal retailers to sell stamped cigarettes free of any state tax, and the Tribe imposes and collects its own 10 percent tax on these sales. Fla. Stat. 210.05(5); Arizona Report at 82-83. We

[22] I have lodged a copy of each study with the Committee. While these studies are two years old, my Office recently confirmed and updated the accuracy of these reports by telephone calls to state and tribal officials.

understand that New York has recently declared it the policy of the Executive Branch not to collect cigarette or gasoline taxes for sales on Indian reservations.

These four states avoid double taxation of a transaction by both a tribe and a state, and recognize such sales as an important source of income for tribes. If Congress does decide to enact legislation in this area, I would commend this approach to you, because it both promotes Indian economic development and acknowledges to the fullest extent possible the often desperate need of generally impoverished tribes for revenue. A variant of this approach is agreements Oklahoma has concluded with sixteen tribes under which tribes agree to make "in lieu" payments to the state equal to 25 percent of the state taxes that would be collected on all reservation tax sales. Arizona Report at 91. The Oklahoma approach is less than a full exemption for on-reservation sales. But, since it allows some price differential in favor of on-reservation sales, it also provides salutary encouragement to tribal economic development.

b. Agreements under which Indian retailers sell tax free to Indians (or tribal members), but collect and remit taxes on sales to non-Indians (or non-members)

Some states and tribes have entered into agreements simply exempting Indian purchasers on reservations from cigarette, motor fuel or other sales taxes. Utah has an agreement with the Ute Tribe exempting all cigarette sales to tribal members from state taxes. Arizona Report at 95. Wyoming has the same type of agreement with the only tribes in that State. Id. at 99. Wisconsin exempts all motor fuel sales to Indians on reservations from taxation. Id. at 98.

Three other states -- Michigan,[23] Montana and Washington -- have accomplished the same result by agreeing with tribes to an allocation of the product to be taxed -- usually tax free cigarettes -- to on-reservation retailers, set by a per capita consumption formula reflecting the number of Indians (or tribal members) residing on the Reservation. Id. at 84, 87-88, 96.[24] Under these agreements, tax free cigarettes can be sold to Indians or tribal members, and state taxes must be collected on sales to non-Indians.

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[23] Michigan has the same structure for motor fuels taxes. Arizona Report at 84.

[24] Michigan has agreements, according to the Arizona Report with four of the ten tribes in its state, Washington with 18 of the 26 tribes in that state, and Montana with all but one tribe in Montana, which, however, is covered by the allocation formula in practice.

c. Agreements providing for a single tax equal to the state tax

i. where the revenue is split between the tribe and state reflecting the percentage on Indian as compared to non-Indian customers

Six states have entered into agreements with tribes under which the tribe adopts the same tax as the state, and providing for a revenue split -- with the tribe taking the tax revenues attributable to on-reservation sales to Indians, the state taking the revenues attributable to sales to non-Indians. This approach accomplishes the same general outcome as an allocation of tax free cigarettes to retailers for sale to Indians. Under both approaches, double taxation by both the state and tribe is avoided.

Minnesota has agreements with all tribes in that state on sharing cigarette tax revenues, and with a number of tribes on sharing revenues of liquor and motor fuel taxes. Arizona Report at 85-86. Montana has such agreements with some tribes on sharing cigarette, liquor and motor fuels taxes. Id. at 88. North Dakota has such an agreement on cigarette taxes with the Standing Rock Sioux Tribe, Id. at 90, as do Oregon and Wisconsin with most or all tribes in those states. Id. at 92,[25] 98. South Dakota has such agreements with four tribes sharing cigarette, contractors excise and sales and use taxes. Id. at 93.

ii. where the Tribe keeps all the tax revenues

Louisiana and Nevada have agreements with most tribes in those states under which the tribes levy a tax equal to the state tax -- on sales of cigarettes and motor fuels in Louisiana, for sales, use and cigarette taxes in Nevada -- but where the tribe keeps all the tax revenues. Id. at 83, 89. This system, of course, treats on and off-reservation sales to non-Indians equally, eliminating possible double taxation by both state and tribes that would disadvantage economic activity on reservations. Unlike the tax sharing approach, however, this type of agreement allows tribes to retain all tax revenues from on-reservation sales, whether to Indians or non-Indians.

d. S. 1691 would undercut resolution of tax issues already accomplished by good faith consultation between states and Tribes.

S. 1691 would replace these voluntary intergovernmental agreements, which have generally resolved the applicability of state sales taxes to on-reservation sales in a manner satisfactory to both

[25] The Arizona Report mentions only two tribes, but we have learned from the Oregon Department of Revenue that agreements have subsequently been concluded with additional tribes.

tribes and states, with a federal mandate undercutting tribal powers of taxation and leaving no room for negotiated solutions satisfactory to states and tribes. It would then open the federal courts to litigation between every tribe and every state. This is undesirable for a number of reasons

First, the large majority of tribal-state tax agreements already result in the state receiving taxes on all on-reservation sales to non-Indians. By these agreements, tribes and states have already resolved -- in a manner favorable to states -- the principal "problem" S. 1691 purports to address.

Second, S. 1691 would substitute contested litigation for negotiated agreements. Litigation is both costly and uncertain as to outcome, particularly where as in this subject area the balancing test of tribal, federal and state interests to determine whether preemption has occurred must be applied, and where complicated questions about the legal incidence of the tax must be determined. E.g., Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. ___, 132 L. Ed. 2d 400 (1995). While a mandatory waiver of tribal immunity would not in and of itself eliminate all the consensual agreements that have been developed, lifting tribal sovereign immunity by Congress would make it less likely states would enter into voluntary agreements with tribes.

Third, Congress should carefully consider the effects of S. 1691 as a matter of economic policy. If tribes are free to enter into commercial transactions with non-Indians free of state taxation, as Florida, Mississippi, New Mexico and New York have voluntarily agreed to permit, economic development of some of the poorest areas of a state is enhanced and the federal policy of Indian economic self-sufficiency is furthered. It is an anomaly for Congress to undermine an area of economic enhancement for tribes already agreed to by a number of states. It is impossible to square this with Congress' trust responsibility for the Tribes.

Concluding remarks

Tribal sovereign immunity is no sterile academic doctrine. It allows tribes to determine their own course -- deciding when to arbitrate private commercial disputes, deciding to what extent they will waive immunity to suit in arbitration or in their own tribal courts, negotiating tax agreements with states that are mutually agreeable. Having the tribes make these decisions themselves -- rather than having a one-size fits all rule dictated by Congress -- is part of the policy of recognizing tribal self-determination and supporting tribal governments so eloquently stated by President Reagan and endorsed by each Administration since President Nixon's.

Tribal sovereign immunity is likewise an important component of the federal policy of promoting Indian self-sufficiency, because it protects limited tribal resources for use in providing desperately needed public services on reservations, rather than being drained in damage awards that could bankrupt tribes.

The contrary approach of S. 1691 would thwart these goals of federal policy, Tribal self-determination would be replaced by Congress unilaterally dictating to tribes, by Congress requiring that federal or state forums would decide important legal disputes involving tribes, by Congress providing that state law would govern these cases -- all without the consent of any tribe. Congress

would impose on the tribes rules no states impose on themselves. Economic self-sufficiency would be throttled -- by an unvarying policy that tribes could not offer tax incentives to non-Indian businesses locating on reservations, by dictating that limited tribal resources must be spent defending costly litigation and paying damage awards in lieu of providing needed public services to impoverished reservations.

Basic to the questions involving tribal sovereign immunity is the issue of whether three decades of the bipartisan federal Indian policy of supporting tribal self-determination and fostering tribal economic self-sufficiency, a policy that has brought many tribes out of poverty and reduced the financial burden of the federal government, should now be reversed. It should not. This bill should not pass.

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April 21, 1998

BY MESSENGER

The Honorable Ben Nighthorse Campbell, Chairman
Senate Indian Affairs Committee
838 Senate Hart Building
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Re: March 11 hearing on tribal sovereign immunity

Dear Chairman Campbell:

Thank you for your letter of March 23, posing four supplemental questions to me. I am pleased to respond to them below, and also wish again to express my appreciation for the Committee's invitation to testify before it on the critical subject of preserving tribes' sovereign immunity from suit.

I set forth your questions and then my responses.

1. Regarding state taxes and collection from tribes, is it accurate to state that current law leaves states with a right, but no remedy?

No. The United States Supreme Court specifically rejected that very proposition when it was argued by the State of Oklahoma in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991). The Court in Potawatomi observed that adequate remedies available to states to collect taxes legally owed them include: (1) suits against individual agents or officers of tribes under the theory of Ex Parte Young, 209 U.S. 123 (1908), (2) collecting taxes from wholesalers, either by seizure of untaxed products or assessments directly on the wholesaler, and (3) entering into mutually satisfactory agreements with tribes for collecting

the taxes. 498 U.S. at 514. An additional remedy would be suits against individual Indian proprietors where the retail establishment is not owned and operated by a tribe itself.

2. Should specific problems in one or two states dictate Federal Indian policy throughout all fifty states?

No. Federal Indian policy, as set by Congress, must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," Morton v. Mancari, 417 U.S. 535, 555 (1974). This obligation requires adherence to "the most exacting fiduciary standards," e.g., Seminole Nation v. United States, 316 U.S. 286, 297 (1942). These standards are obviously not fulfilled by sacrificing Indian governmental rights and protections because of "problems in one or two states."

I suggest that Federal Indian policy in the area of state taxation of non-Indians doing business with Indians on reservations should be guided primarily by the "'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Indians, 480 U.S. 202, 216 (1987) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983)). Decisions of the Supreme Court such as Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) and Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) -- which permit states to tax some non-Indians doing commerce on reservations with tribes and Indians -- thwart tribal economic self-sufficiency in two ways. First, they make it impossible for tribes to give non-Indians a tax incentive to do business on a reservation instead of outside it. This is so because whenever state taxes are collected from non-Indian economic activities on a reservation, the tribe cannot encourage those businesses to locate on the reservation by imposing a tax lower than that of the state. Second, if a tribe imposes any tax at all on the same on-reservation commerce that the state also taxes, this actually creates a disincentive for economic activity on Indian reservations. Tribes are thus faced with a cruel dilemma anytime states are permitted to tax an activity on the reservation -- they must either forego their sovereign right to tax the activity or exercise their sovereign right at the cost of discouraging the activity, possibly even driving it to locate outside the reservation. Congress should protect tribes from this dilemma.

Most Indian reservations remain economically deprived areas. Federal Indian economic policy should encourage commerce on reservations, not discourage this commerce by enforcing collection of additional tax burdens a state places upon it, as Colville and Cotton Petroleum do. These cases simply consider whether state taxes are preempted by federal law in the absence of specific action by Congress. If Congress acts in this area, it should act to bar or limit state taxes (by requiring at the very least that states give a full credit for taxes paid to the tribe) so as to encourage economic activity on the reservations.

3 Are tribes generally prevented from suing states in federal court?

Generally yes. Three recent United States Supreme Court rulings consider and limit the circumstances under which tribes may sue states or state officials in federal court. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Seminole Tribe v. Florida, 517 U.S. __, 134 L.Ed. 2d 252 (1996), Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. __, 138 L.Ed. 2d 438 (1997).

a. suits against states

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), holds that the Eleventh Amendment generally gives states immunity against suits by tribes in federal court. The Court held the Eleventh Amendment generally prevents the federal courts from hearing suits against states unless either the state consents to be sued in federal court or the suit is brought by the United States or -- in certain circumstances -- by other states. Although it recognized that tribes are also sovereign, the Court held they cannot sue states in federal court. In Seminole Tribe v. Florida, 517 U.S. __, 134 L.Ed. 2d 252 (1996), the Supreme Court held that even Congress cannot waive a state's Eleventh Amendment immunity from suit by tribes in federal court unless Congress is acting to enforce one of the Civil War Amendments such as the Fourteenth Amendment.

Thus, the Supreme Court has held that states cannot be sued by tribes in federal court, and can only be sued in federal courts at all in very limited circumstances. I believe these holdings actually furnish support for continuing the congressional policy of not waiving tribal immunity to suit in federal courts. A policy of continuing tribal immunity would treat tribes in a fashion similar to states, which I understand is an avowed purpose of S. 1691.

b. suits against state officials

Tribes (like anyone else) can sometimes sue state officials in federal courts if those officials violate federal law. The Supreme Court nearly a century ago created an important exception to the Eleventh Amendment immunity to make sure that state officials do not violate federally-protected rights. See Ex Parte Young, 209 U.S. 123 (1908). Under this Ex Parte Young exception, a suit can be brought against state officials in federal court to compel them to take actions in accord with federal law. Ex parte Young is an important doctrine necessary to provide a federal court to protect federal rights from violations by state officers. However, the Supreme Court has also limited the availability of this doctrine for tribal suits in its recent Seminole and Coeur d'Alene decisions.

In a closely divided 5-to-4 decision, the Court held in Seminole that states and state officials are immune under the Eleventh Amendment from suits brought by Indian tribes to enforce the compact negotiation requirement of the Indian Gaming Regulatory Act (IGRA). Seminole Tribe v. Florida, 134 L.Ed. 2d at 277-279. In Seminole, the tribe sued the governor (as well as the State) to secure compliance with IGRA's statutory requirement that the state enter into good faith negotiations with a tribe seeking to establish casino gaming on a reservation. The majority in Seminole rejected the tribes' argument that a suit to enforce IGRA's compact negotiation provisions could be brought against state officials under Ex Parte Young. Id. The majority opinion reasoned that since the language of IGRA specifically provides for very detailed remedies directed against the "state," Ex Parte Young was not available as an additional remedy. Id. at 278. As a practical matter, this ruling means that Indian tribes have no judicial remedy under IGRA against states which fail to negotiate in good faith regarding a compact for Class III gaming, unless the state consents to being sued.

Idaho v. Coeur d'Alene, 521 U.S. __, 138 L.Ed.2d 438 (1997), considered whether the Ex parte Young doctrine applies to a federal court suit by a tribe against state officials to establish the tribe's exclusive rights over a lakebed. Although the Court ruled that the Ex parte Young doctrine did not apply to this particular claim, the Court did sustain the general availability of the doctrine if invoked by tribes.

In Coeur d'Alene, the tribe filed suit in federal court against Idaho officials to establish the Tribe's right to the bed and banks of a lake within the Coeur d'Alene Reservation. Idaho v. Coeur d'Alene, 138 L.Ed. 2d at 438. The state officials argued that the suit should be dismissed because under the Eleventh Amendment they and the state were immune from suit in federal court. Id. A majority of seven Justices concluded that the Ex parte Young doctrine generally is available for federal court suits to enjoin state officials from interfering with federally-protected rights. Id. at 446-448. At the same time, a majority of five Justices held that the Ex parte Young doctrine was not applicable on the special facts of the Coeur d'Alene case, because that suit involved a state's asserted property interest over use and possession of navigable waters, and therefore the case was in essence a quiet title action against the State and barred under the Eleventh Amendment. Id. at 455. Two members of the Court – Chief Justice Rehnquist and Justice Kennedy – took an unprecedently narrow view of when the Ex parte Young doctrine might be available. Their opinion suggested major new limitations in the Ex parte Young doctrine not previously advanced in any of the Supreme Court's cases. Id. at 448-455.

As a practical matter, Coeur d' Alene means that tribes cannot bring suit in federal court against states or state officials to establish the Tribe's title to a lakebed unless the state has consented to suit in the federal courts, or the United States appears as a party on the side of the tribe. However, a majority of seven Justices made it clear that they would not depart from the established law which generally permits actions to be brought in federal court for equitable relief

against state officials under Ex parte Young.

4 Of the remedies noted by the Supreme Court as available to states to ensure taxes on sales made to non-Indians are remitted, which have been utilized most?

Your question refers, I believe, to the remedies set forth by the Supreme Court in the Potawatomi case; I set forth those remedies in response to Question 1.

I believe the most common way this problem is addressed is for states and tribes to enter into agreements concerning application and/or collection of state cigarette and other sales taxes As more particularly set forth in my written testimony, fourteen states have entered into agreements with 91 tribes concerning cigarette sales taxes:

State	Number of Tribes
Colorado	2[1]
Louisiana	2[2]
Michigan	4[3]
Minnesota	10[4]
Montana	6[5]
Nevada	13[6]

[1] Arizona Legislative Council, State-Tribal Approaches Regarding Taxation and Economic Development (1995) at 82 (hereafter "Arizona Report"). I supplied the Committee with a copy of this Report along with my testimony.

[2] Id. at 83.

[3] Id. at 84 and personal communication, Michigan Department of Revenue. We understand that Michigan is currently negotiating agreements with Tribes in that state.

[4] Id. at 85

[5] Id. at 88

[6] Id. at 89. One tribe prepays the state tax and applies for a refund from the state. According to the Arizona Report, the cigarette and tobacco excise agreements are mainly for the purpose of clarifying the respective obligations of the tribes and state By state statute, no sales and use or cigarette and tobacco excise taxes are imposed on reservation transactions if the tribe itself imposes a comparable tribal tax. This statute covers all 24 tribes in the State.

North Dakota	1[7]
Oklahoma	17[8]
Oregon	2[9]
South Dakota	4[10]
Utah	1[11]
Washington	18[12]
Wisconsin	10[13]
Wyoming	1[14]

As I discussed in my written testimony, these intergovernmental agreements take various forms. Most of these agreements actually follow the pattern of the major Supreme Court cigarette tax cases by (1) exempting all on-reservation sales to Indians from state tax, but agreeing to imposition and collection of taxes on sales to non-Indians either directly or through an allocation system -- Michigan, Minnesota (some tribes), Montana (some tribes), Utah, Washington, Wisconsin (some tribes) and Wyoming, or (2) agreeing on the part of the tribe to impose the same tax as that imposed by the state, and sharing this "single tax" between the tribe and the state on a prearranged basis, reflecting the percentage of the sales to Indians as contrasted to non-Indians -- Minnesota (some tribes), Montana (some tribes), North Dakota, Oregon, South Dakota and Wisconsin (some tribes). Two states -- Louisiana and Nevada -- have actually agreed that tribes may keep all the tax revenues from the "single tax," whether the on-reservation sales are to Indians or non-Indians provided this single tribal tax is equivalent to the state tax. In Oklahoma, the tribes covered by agreements make in lieu payments to the state equal to 25% of the state tax rate for all sales of cigarettes whether made to Indian or non-Indian purchasers.

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[7] Id. at 90.

[8] Id. at 91 and personal communication, Oklahoma Tax Commission.

[9] Id. at 92.

[10] Id. at 93.

[11] Id. at 95.

[12] Id. at 96. Under Washington state regulations, these tribes participate in an allocation system whereby the State allows each tribe an annual quota of tax free cigarettes.

[13] Personal communication, Wisconsin Department of Revenue.

[14] Arizona Report, p. 99.

Four states have no agreements with tribes but have enacted statutes or provide administratively that no state taxes shall be collected on cigarette sales by tribal retailers on reservations -- Florida (two tribes), Mississippi (one tribe, sale and gross receipts taxes), New Mexico (23 tribes), New York (seven tribes).[15] Another state, Nebraska, collects all cigarette taxes for on-reservation sales and tribal retailers on the six Nebraska reservations submit claims or refund to wholesalers. In turn, the wholesaler gets credits on stamped cartons of cigarettes.[16]

In summary, then, 19 states and tribes have worked out mutually acceptable resolutions of the issue of state taxes on Indian cigarette sales on 130 tribal reservations.

While I believe this demonstrates that intergovernmental agreements are the most common way of addressing the problem, there are several reported suits that have been successfully brought against tribal officials to enforce collection of state cigarette taxes on tribal sales to non-Indians under the Ex Parte Young concept. In United States v. Finn, 919 F. Supp. 1305 (D. Minn. 1995), *affirmed*, 121 F.3d 1157 (8th Cir. 1997) the court held that tribal sovereign immunity was not a defense available to tribal officials who allegedly submitted false sales tax returns to the State since a Tribal-State compact required collection of taxes on all on-reservation transactions, and thus if the allegations in the indictment were true, the tribal officials were acting outside the scope of their employment. Similarly, in State v. Thlopthlocco Tribal Town of Okl., 839 P.2d 180, 185 (Okl. 1992), the Oklahoma Supreme Court held that tribal sovereign immunity does not excuse the Tribe from assisting in the collection of taxes on sales to non-tribal members. See also, California Bd. of Equalization v. Chemehuevi Tribe, 474 U.S. 9, 12 (1985).

There are also a number of reported cases where courts have required individual Indian retailers to collect cigarette taxes on sales to non-Indians. E.g., Kaul v. Stephan, 83 F.3d 1208, 1216 (10th Cir. 1996)(Kansas had probable cause to search on-reservation business since no State law exempted Indian retailers from collecting sales tax on sales to non-Indians), United States v. Gord, 77 F.3d 1192, 1194 (9th Cir. 1996) (Possession of unstamped cigarettes by Indian retailers, even if intended for on-reservation sale to Indians, violated Washington state law and formed the basis for an action under the federal Contraband Cigarette Trafficking Act.), United States v. Baker, 63 F.3d 1478, 1489-1491 (9th Cir. 1995) (Washington's tax scheme as it applies to Indian retailers located on-reservation did not impermissibly burden tribal sovereignty, was not preempted by federal law and did not violate the Equal Protection Clause of the Constitution), State of Oklahoma v. Bruner, 815 P.2d 667, 669-670 (Okl. 1991) (State can enforce sales taxes

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[15] Arizona Report, pp. 82, 86-89, "Legislators balk at Pataki plan," Buffalo News, May 29, 1997 and "Governor Pataki Acts to Bring Fairness to Indian Nations" New York Executive Chamber Press Release, May 22, 1997.

[16] Personal communication, Nebraska Department of Revenue.

collection requirements on sales to nonmembers, record keeping requirements, and registration requirements on Indian conducting business on reservation, but cannot require retailers to obtain state licenses and permits). See also, New York State Department of Taxation and Finance v. Tyler Distribution Centers, Inc., 639 N.Y.S. 2d 515 (1996) and New York State Department of Taxation and Finance v. St. Regis Group, 635 N.Y.S. 2d 980, 983 (1995) (State could impose its registration requirements and forfeiture laws against liquor distributors transporting to an Indian reservation located within New York); Snyder v. Wetzler, 603 N.Y.S. 2d 910, 914 (1993), *affirmed*, 620 N.Y S. 2d 813 (State has legal authority to require an Indian retailer to collect excise and sales taxes on sales to non-Indians occurring on-reservation); State of Arizona v. Dillon, 826 P.2d 1186(Ariz. 1991) (Arizona luxury privilege tax validly imposed on non-member Indian retailer doing business on reservation); Gord v. State of Washington, 749 P.2d 678, 682 (Wash. 1987) (State can enforce sales tax for on-reservation sales made to non-Indians). These, of course, are all reported cases. There may well be a larger number that are not reported.

Overall, then, I believe it is clear that most states have worked this problem out with well over 100 tribes, and that adequate legal remedies are available to states where tribal or Indian retailers have not agreed upon a resolution of the cigarette tax collection problem.

Sincerely,

Reid Peyton Chambers

RPC:skk

DS01/15648-1

TESTIMONY OF THE
SHOSHONE BANNOCK TRIBES OF THE FORT HALL RESERVATION
ON SENATE BILL 1691, 105TH CONGRESS 2d SESSION

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in southeastern Idaho, present the following written testimony in opposition to Senate Bill 1691. Senate Bill 1691 strikes at the heart of tribal sovereignty by seeking to eliminate an essential attribute of such sovereignty – tribal sovereign immunity. This broad, far-reaching legislation is in direct conflict with the established federal policy of tribal self-determination, contravenes the well established principles of federal Indian law enunciated by the United States Supreme Court and Congress supporting tribal courts, and treats tribal governments in a discriminatory manner in violation of its trust responsibility. Senate Bill 1691, if enacted would have a devastating impact on the basic functioning of tribal governments to pursue economic development through contracting; to provide a stable revenue base for its membership without intrusions from state courts and tax agencies, and private sector, to protect their governmental coffers from frivolous lawsuits; to preserve their tribal judicial system from outside interference of foreign federal and state court judges; and provide for the general health, welfare and safety of their tribal community and reservation homelands. For the reasons above and presented more fully in this testimony, the Shoshone-Bannock Tribes must strongly oppose Senate Bill 1691.

The status of Indian tribes as governments has been confirmed repeatedly by the United States Supreme Court. It is thus well established that Indian tribes are sovereign entities with inherent powers of self-government. These inherent powers of tribal sovereigns are powers not delegated from Congress, but rather are powers that originate from the original sovereignty of Indian tribes, sovereignty which predates the European arrival to this continent and the formation of the United States.

Tribal sovereignty has several adjuncts, one of the most important of which is tribal sovereign immunity. Indeed, over 75 years ago, the Supreme Court recognized the tribal immunity doctrine. Turner v. United States, 248 U.S. 354, 359 (1919). This doctrine has been consistently reaffirmed by the Supreme Court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Oklahoma Tax Comm'n. v. Potawatomi Indian Tribe, 498 U.S. 505 (1991). Moreover, the common law immunity of Indian tribes is coextensive with that of the United States. Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983).

Tribal sovereign immunity is necessary to preserve the autonomous political existence of tribes. Furthermore, one of the fundamental purposes of sovereign immunity is to protect against unconsented lawsuits for retroactive relief in the form of money damages payable from a public treasury. Such relief is prohibited because it would deplete the public treasury as a means of compensating for past wrongs. Sovereign immunity also prevents unwarranted frivolous suits being filed against governments which can cripple a government's ability to govern if it must continually respond and defend such suits.

Senate Bill 1691 seeks to authorize the blanket waiver of the thoroughly embedded doctrine of tribal sovereign immunity, and open the door for lawsuits against tribal governments in several areas including general contracts actions, state taxation, and tort claims. The proposed legislation also permits such lawsuits to proceed in federal and state courts and totally disregard the established tribal court system and tribal laws enacted to control business and civil matters and relationships on Indian reservations and involving tribal governments. The Shoshone-Bannock Tribes adamantly oppose Senate Bill 1691 based on several reasons.

First, Senate Bill 1691 is a major retreat and is totally inconsistent with the well established federal-tribal relationship. The three branches of the federal government have formally acknowledged tribal sovereignty through two centuries of treaties, executive

orders, legislation and judicial opinions. In 1975, President Richard Nixon reversed the decades of assimilationist and domineering federal policy towards Indian tribes by announcing a new era of "Self-Determination" in which tribes would be supported in their efforts to gain tribal self-sufficiency. Each succeeding administration has embraced this Indian policy and the important government-to-government relationship, including President Clinton who reaffirmed it on April 29, 1994 when he issued his directive in dealing with Indian tribes. Accordingly, each administration has pledged its commitment to upholding its treaty obligations to tribes, and its trust responsibility to protect and preserve tribal institutions, resources and land, and communities from the intrusions of the majority society

Similarly, an immense body of Indian law has developed in the judicial arena interpreting federal and other laws to uphold tribal sovereignty and its adjunct – sovereign immunity. The Supreme Court has most consistently recognized the inherent powers of tribal governments and interpreted many laws, regulations, and policies to reaffirm the essential powers of tribes to enter undertake commercial and business dealings, to control and regulate their territories, and to raise revenue in the form of taxes. In general, the Supreme Court has consistently upheld tribal self-determination, and preempted the intrusions of states into tribal matters.

The Congress has played a major role in bolstering tribal sovereignty and promoting the goal of tribal self-sufficiency. Congress has facilitated the self-determinations of tribes by the passage of legislation in a broad spectrum of areas including, economic development, financing, exemptions from certain state taxation, improvements for judicial and law enforcement systems, contracting, cultural preservation, education, social services, environmental regulation, and natural resources development. Significantly, Congress provided an exclusive role for tribes in each of these acts rather than assuming

that the federal or state agencies would undertake such responsibility. Indeed, in the field of environmental regulations Congress has treated tribes as states for purposes of primary authority, in the area of natural resource development, tribes have been provided greater flexibility in negotiating and entering into mineral agreements, and in the area of economic development tribes Congress has enacted legislation to facilitate tribal control and increase their governing capacity.

Overall, the major legislation enacted by Congress has vested important decisionmaking in tribal governments, and tribes are meeting the challenges of greater responsibility entrusted to them by the Congress and the courts. Tribal governments are increasingly complex entities with major infrastructures implementing and administering laws, controlling and regulating their territories and conducting business and development with majority society. Senate Bill 1691 now seeks to shift and abruptly change the major federal Indian policy of self-determination. Such a drastic change is unwarranted and would not be rationally related to the federal government's treaty commitments to tribes, and its trust relationship to tribes.

Second, Senate Bill 1691 threatens the political integrity of tribes in terms of their sovereign right to determine the law of torts, contracts and civil rights occurring on the reservation. The proposed legislation would permit state law to be applied in actions involving torts and contracts and federal law in civil rights actions, even if the case arose on in Indian territory and involved a tribal government. The Supreme Court has declared that tribal courts play a vital role in tribal self-government. Iowa Mutual Ins. V. LaPlante, 480 U.S. 9, 14 (1987). A tribe's role is critical particularly with respect to torts, an area of common law traditionally addressed through a judicial forum. The Tribes, no less than the states, have an essential interest in providing a court to hear tort claims arising within its territory and involving the tribal government. Moreover, allowing state law to be

applied to reservation based incidents is a direct intrusion into the affairs of tribal governments and their ability to make and enforce their own laws.

Senate Bill 1691 also disregards the tribal judicial systems established to hear civil matters including contract disputes, tort claims and civil rights violations, and instead permits such actions to be directly filed in federal and state courts. Elevating the power of state and federal courts at the expense of tribal courts is a direct assault on the concept of tribal sovereignty. Central among the powers of a sovereign and essential to tribal self-government is the provision of a forum for disputes arising on an Indian reservation. Indeed, the authority to provide a forum for such disputes is integral to the definition of tribal sovereignty. See, Iowa Mutual. Moreover, the examination and interpretation of tribal documents, constitutions and laws must in the first instance be undertaken by a tribal judge not a state or federal court judge. The doctrine of exhaustion of tribal court remedies provides state and federal courts with the benefit of a tribal judge's expertise. National Farmers Union Ins. Co., v. Crow Tribe, 471 U.S. 845 (1985). Additionally, in considering the Indian Tribal Justice Act, the Senate emphasized that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S.Rep.No. 103-88, 103rd Cong., 1st Sess. 8 (1993). Similarly, the House confirmed the same understanding. H.Rep. No. 103-205, 103rd Cong., 1st Sess. 9 (1993).

Furthermore, over 160 years ago, the Supreme Court first articulated the policy against state interference in Indian affairs. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The concept that state law has no force in Indian country remains today and has been reaffirmed in an unbroken line of authority. In 1945, Justice Black proclaimed, "The policy of leaving Indian free from state jurisdiction and control is deeply rooted in this Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). These basic federal Indian

law principles reinforce tribal sovereignty and a tribe's political ability to make their own laws and be ruled by them. Permitting the filing of lawsuits against tribal governments in federal and state forums, off-reservation, especially for reservation based actions totally ignores the well established case precedent. And, the bill permits the interference of state law in reservation and tribal activities, a concept that is inherently detrimental to any tribal political integrity and the authority of tribal courts. As emphasized in 1886 by the Supreme Court for its justification in excluding state control over Indian affairs: "They [Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375 (1886). That justification is equally viable today for rejecting Senate Bill 1691.

Third, Senate Bill 1691 broadly waives the sovereign immunity of tribes for tort and contract claims while preserving the sovereign immunity of states. This unprecedented proposal amounts to an unequal treatment of tribal governments as opposed to the treatment of state governments in similar situations. This discriminatory unequal treatment of Indian tribes is certainly not "tied rationally to the fulfillment of Congress' unique obligation toward Indians." Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977). Significantly, Senate Bill 1691 is in direct conflict with the Congress' trust responsibility to protect the right of tribes to govern themselves and their reservations through and by the enactment of tribal self-determination legislation and policies.

Again, this proposed legislation is a direct assault upon the sovereignty of tribes. The legislation provides for a general, unlimited waiver of tribal sovereign immunity for contract and tort claims. Rather than recognizing that tribal governments have the authority to negotiate and decide to waive their immunity, particularly in business and commercial dealings, Senate Bill 1691 consents to lawsuits against tribal officials and

government. Senate Bill 1691 is based upon the misconception that every tribal government refuses to waive its sovereign immunity in all situations. Additionally, Senate Bill 1691 disregards the fact that many tribes doing business under their Section 17 Indian Reorganization Act Corporations have a waiver of sovereign immunity in their charters. Thus, there is an established means by which tribes do waiver their sovereign immunity, but it does not waive the immunity of the tribal government as proposed wholesale by Senate Bill 1691. Tribes also waive sovereign immunity to the extent of the limits of liability insurance that the tribal government has purchased, and provide for limited waivers of sovereign if the proceeding is brought in the tribal court.

Congress has provided funding and legislation for tribal governments to pursue a wide array of business and commercial dealings to bolster tribal economies and provide for basic essentials on many reservations. Congress must also permit tribes the opportunity to make business decisions and enter into contracts without direct interference as set forth in Senate Bill 1691.

Finally, Senate Bill 1691 subordinates Indian tribes to individuals and corporations for the purpose of permitting tort claims against tribal governments. In short, such action would extinguish the entire sovereignty of tribes and turn back the hundreds of years of case precedent, congressional acts and executives orders recognizing tribes as sovereign governments. As made perfectly clear by the Supreme Court, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory." And Indian tribes "are a good deal more than 'private voluntary organizations." United States v. Mazurie, 419 U.S. 544 (1975).

In conclusion, Senate Bill 1691 is attempting to eliminate tribal sovereignty. Senate Bill 1691 is attempting to do so in the absence of any concrete facts or rational reasons to justify such devastating Congressional action. Clearly, this legislation must be rejected in

light of the overwhelming federal policy of supporting tribal self-government by all three branches of the federal government; in light of the established case law recognizing and upholding the authority of tribal judicial systems to adjudicate civil contract, tort and civil rights cases; and in lights of the Congress' trust obligations to Indian tribes.

PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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TESTIMONY OF BURTON BLACK ON BEHALF OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

BEFORE THE COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE WEDNESDAY MARCH 11TH 1998

On behalf of the Petroleum Marketers Association of America (PMAA), I would like to provide testimony on the issue of sovereign immunity and how it affects small businesses and the tax structures of the states. I am Burton Black and am President of Black Oil Company, and I am also President of the Utah Petroleum Marketers Association. Black Oil serves the needs of petroleum users in the four corners area of Arizona, Colorado and Utah, through four company operated convenience stores, three commissioned agent locations, two bulk plants and nine dealers. In 1997, Black Oil sold $15,500,000 worth of products, of which $10,000, 000 were petroleum products. If you have any doubts, I am the typical small business marketer who is the core constituent of the Petroleum Marketers Association of America.

The Petroleum Marketers Association of America (PMAA) is the national representative of petroleum marketers. PMAA represents marketers in nearly every state through its state and regional associations. Together these marketers sell nearly 50 percent of the diesel and over 40 percent of the gasoline consumed in the United States. Nearly 90 percent of these members are small businesses.

Over the last several years, there has been discussion throughout the industry of the growing problem of tax evasion on fuels. With taxes of 24.4 cents a gallon federal and as much as 39 cents a gallon in state taxes, evading motor fuel taxes has been a passion for many. Over the last decade, the industry has been victimized by the traditional Mafia and the Russian Mafia. Additionally, there are people importing and exporting product to Canada and avoiding the national taxes of both countries. As long as the rate of tax is this high, there will be a strong incentive to find a way to avoid paying the tax either through legal loopholes or plain theft.

Unfortunately, the latest group who is willing to engage in the evasion of taxes are Native Americans. We have seen the evasion occur in several states including New York, Washington, Oklahoma, New Mexico, Utah and Arizona. Now, I use the term evasion, and I recognize that the tribes do not see it as evasion. They are of the view that they are beyond the reach of state governments who are trying to impose the taxes and are enjoying their sovereign rights to sell fuel tax free.

I am not here to discuss the historical relationships of the tribes and the United States or the current status of the tribes and their peoples. I am here to describe tax evasion that results in unfair competition.

Under the current law, most of which has been established by the United States Supreme Court, the general rule is that the doctrine of tribal sovereign immunity prevents a state that has not asserted jurisdiction over native American lands under P.L 280 from taxing the sale of goods to members of a federally recognized Indian tribe when sales occur on land held in trust by the U.S. government for the benefit of the Tribe. However a State may collect taxes on sales to nonmembers of the Tribe. While the Tribe has an obligation to collect these taxes, the state may not maintain an action in state or federal court to require the tribal government to provide such assistance.

Thus, we are left without a remedy when a tribal fuel retailer sells fuel to someone who is not a member of the tribe. They should collect the state tax which is nineteen cents per gallon and they should send it to the state where the retailer is located. However, if the Tribe does not do this, several things happen. First, the state gets no money for road construction or other public works projects. Second, the tribal retailer will enjoy both a substantial price and profitability

advantage in the market. Third, the state can do nothing to correct the situation.

For my company, it is of course impossible to determine what is going on in a particular market. I have no right to review tax forms of other retailers, I cannot review invoices, and I cannot verify where the fuel is being bought. What I can verify is what is going on in the market. I have traditionally supplied two facilities in northeast Arizona as their wholesale supplier. I have been informed by the dealers at these locations that the Navajo Oil and Gas Company has offered to sell them fuel at a price below my wholesale price plus tax. Thus, the stations intend to terminate their business with my company.

I heard from my brother who operates in Kayenta, Arizona and he stated that a competing service station on the Navajo Reservation was purchased by the Navajo Oil and Gas Company. As a result, this station no longer charges the state tax on sales and he is no longer competitive and is likely to go out of business.

In Roosevelt, Utah, I have a dealer who competes with the Ute Tribe. At this facility, the tribal store is able to sell fuel to all customers. The Utes are able to sell gasoline at a price 2-3 cents less than my purchasing price which includes the fuel taxes. Of course, I cannot compete since I have to pay for transportation, insurance, and income taxes. At this station, the Utes charge the same price for both tribal and non-tribal members.

It is my understanding that this price that is charged is the same for both tribal and non-tribal members. How this can occur is a little uncertain. The Tribes are allowed to purchase fuel for government use without the tax but generally are not supposed to purchase the fuel for resale to the motoring public without taxes. Fortunately for the Treasury of Utah, these locations are fairly remote and low volume stations. However, that is no consolation to me.

The Governor is currently examining issues of taxation in Utah. But it is my opinion that he has no power to force the Tribes to fully comply with any law that would fully impose the tax.

Why should this be a concern of Congress? The main reason is that the United States Constitution specifically requires the Congress to regulate commerce between the states and between the Indian Tribes. Thus, it is clear that the framers of the Constitution intended the Congress to continuously examine these issues.

Additionally, when the U.S. Supreme Court has reviewed cases regarding these tax issues, they have indicated that proper recourse lies with the Congress. We would concur. We believe that states and Tribes should be working to collect the taxes that are owed. Further, we believe that the states and the Tribes should be able to develop an effective method of allocating the funds to the parties that are entitled to the tax receipts. In a model world this would occur without federal intervention. However, we do not live in a model world, and since Congress is responsible for these relationships, Congress must intervene to remedy the problems.

While several states have attempted to curtail evasion, the results have been mixed. The one thing that has been perfectly clear is that states are not able to control the issue. It is also clear that without federal legislation, there cannot be a level playing field.

In conclusion, I and my national association are encouraging you to develop and pass such legislation. Section three of the American Indian Equal Justice Act would empower the states to collect these taxes and thus we are supportive of this legislation. However, we would welcome the opportunity to work with the Committee to develop and implement any solution which ensures a fair marketplace.

BLACK OIL CO.
Wholesale • Retail

March 19, 1998

Senator Slade Gorton
730 Hart Building
WASHINGTON DC 20510

Dear Senator Gorton;

My name is J. Burton Black, and I'm a third generation petroleum marketer (I'm also privileged to be serving as the President of the Utah Petroleum Marketers Association). My Grandpa started distributing petroleum back in the days when (and to) John Ford and John Wayne were making movies in Monument Valley. I represent Black Oil Company, of Monticello, Utah. We serve the needs of petroleum retailers and users in the four-corners areas of Arizona, Colorado, and Utah. In 1997, Black Oil sold over 10 million gallons and 15.5 million dollars of product.

I testify to you of the growing problem of Native American Tribes and businesses evading state excise taxes on motor fuels. This tax evading practice translates into an 18 to 25 cent per gallon advantage for Native American Tribes and businesses in our market area.

Even though this is 'state excise tax evasion,' it is a federal problem because tribes fall under sovereign nation status and are thereby not governed by state law.

In our area, we compete against Navajo Nation Oil and Gas, Inc. (hereafter referred to as NNOG). Remarkably, NNOG recently told Dun & Bradstreet that they expect sales of over 30 million dollars this year! *And, it's only their third year of operation*!!!! *It has taken Black Oil over 60 years to gain 15.5 million dollars in annual sales!*

Additionally, Dun & Bradstreet reports that NNOG is owned 100% by the Navajo Tribe (suggesting that federal dollars are competing, either directly or indirectly, against us traditional petroleum marketers).

At these staggering, federally-tolerated competitive advantages, it won't be long before NNOG is the only marketer serving the Navajo Nation. When and if this happens, will gasoline continue to be sold on the Navajo Reservation at the price that is today? If NNOG is the only marketer serving the Navajo Nation, wouldn't that be considered as violating federal anti-trust laws?

Black Oil is losing the business of two Northern Arizona dealer locations to NNOG; even though, the State of Arizona is trying (unsuccessfully) to crack down on those who do not collect and remit state excise taxes on motor fuels. The financial loss to Black Oil in losing these two locations will be over $30,000 in *net profit* annually.

NNOG has promised to loan or grant over $150,000 to the owner of these locations if he'll buy fuel from them for both locations. The only way that NNOG can afford such subsidies is to charge their dealers (including our soon-to-be-former dealer locations) 5 to 8 cents per gallon less

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than we do (which, by the way, is less than our delivered cost), keeping the non-remitted state excise tax for themselves.

Some fellow traditional marketers are now adopting the "If-you-can't-beat-'em, join-'em" stance, working through firms with native American ties to distribute state excise tax-free fuel. As this trend continues, less and less funds will flow into the coffers of the states. Consequently, those states will turn to the federal government for help.

Thence, more and more traditional marketers will find it harder and harder to remain in business.

Therefore, Senator, I urge you to close this loophole as soon as possible. Stop the tribes from competing unfairly against us traditional marketers ***AND*** keep the states' highway funds solvent.

Thank you for listening. May the Lord bless you in your endeavors to legislate our great country.

Sincerely,
BLACK OIL CO., INC., and
UTAH PETROLEUM MARKETERS ASSOCIATION

J. Burton Black
President

cc: PMAA - John Huber.

El CAPITAN SERVICE
Box 145
Kayenta, Arizona 86033

February 25, 1998

Mr J. Burton Black, President
Black Oil Co.
Monticello, Utah 84535

Dear Burton,

I am writing to you as my Texaco Petroleum Distributor and as a Director of the Utah Chapter of Petroleum Marketers Association to solicit your assistance in helping me solve a major problem developing in my marketing area.

I am sure you are aware the Chevron Service Station neighboring my Texaco Station in Kayenta, Arizona was purchased by the Navajo Oil and Gas Co. a couple of years ago. For the past 14 months the Navajo Oil and Gas Co. has been able topurchase and resale gasoline for their stations on the Navajo Reservation exempt Arizona State Gasoline Tax. This gives them an 18¢ per gallon advantage over the other stations on the Reservation which they do not either own or distribute to.

I am not able to market my gasoline as cheaply as they do so I find my sales volume decreasing every month. I have been in business at this location for over 33 years. I feel I have served the public well and consequently I have developed a fairly large customer base. But gradually I find my customers drifting away because I can not sell them gasoline as cheaply as does the Chevron sation. At the rate it is going, I will not be able to remain in business much longer.

I hope that you can help do something to level the playing field. Either cause the Navajo Oil and Gas Co. to pay Arizona Gasoline Tax or allow the rest of us to purchase gasoline State Tax exempt. This current injustice must be corrected or all non Navajo Oil Co. stations will be forced out of business.

Your assistance is greatly appreciated.

Paul D. Black

MUSCOGEE (CREEK) NATIONAL COUNCIL

Creek Capitol Complex · The Mound · Hiway 75 at Loop 56 · PO Box 188
Okmulgee, Ok 74447 · 918/756-1410 · FAX 918/756-6812

Speaker: Kenneth L. Childers, Sr. *Second Speaker: Bill S. Fife*

STATEMENT TO THE SENATE COMMITTEE ON INDIAN AFFAIRS ON SOVEREIGN IMMUNITY

March 11, 1998

Good morning Mr. Chairman and members of the Committee, I am Bill S. Fife, Second Speaker of the National Council, the legislative body of the Muscogee (Creek) Nation. With me today also is Kenneth L. Childers, Speaker of the National Council.

I appear before the Committee today to express the Muscogee Nation's extreme concern over the legislation proposed by Gorton.

I want to provide perspective about the Muscogee (Creek) Nation and how we, as a people, characterize our sovereignty and OUR Nation. Muscogee is the name we have for ourselves. "Este Muscogee" which means Muscogee People. Originally, we lived in Southeastern United States and treatied with the nations of England, Spain, and France prior to entering into our first treaty with a young United States in 1790. White encroachment upon our lands, encouraged by President Andrew Jackson, resulted in a forced removal to Indian Territory in the 1830's.

Arriving in our new homeland, we re-established the tribal government, ratified a constitution, established schools, court systems, law-enforcement officers and jails, and a diversified mix of all thing necessary to run a Nation. Then came the American Civil War and afterward, the Creek Nation, along with the United States, went through a reconstruction period.

We ratified a new Constitution, built a new Council House in our Capitol City, Okmulgee, and struggled with our economy. We were a strong sovereign Nation.

However, as the 20th Century emerged, a new threat was forming. Statehood! and a desire four our resources. We fought for the sovereignty of our government — our lands — and the very existence of our people. Our natural resources were at stake: land, and, among other things, oil — the two natural resources that could benefit our people. By 1901 the Dawes Commission was enrolling our tribal members for allotments. Through the Sequoyah Convention we, along with other tribes, fought statehood, but the Enabling Act of 1906 ended that effort.

That same year, the Five Tribes Act was enacted with the intent to strip the tribal government of its powers: however, the task was never completed, and our government continued--despite Federal intervention and suppression.

Years passed. Tribal leaders worked steadfastly to keep our government going. In the 70's, despite strong Federal opposition, the word of the people succeeded in the ratification of a new constitutional government. Still new battles lay ahead in the civil and criminal jurisdiction arena--and again, despite Federal opposition, our Court and Law Enforcement systems were restored.

We've maintained the new Muscogee (Creek) National government for around 160 years since the removal to Indian Territory. Oklahoma has only been in existence for 86 years. When compared to the Creek Nation, Oklahoma is still a fledgling government. We spent the first 78 years of this century battling to unlock the chains of Federal suppression; and, we spent the next 15 short years forgoing a new constitutional framework - the word of the people!

The Federal government is challenging our sovereignty by entertaining legislation to forcibly waive immunity of Indian tribes for claims arising in tort or contract thru S.1691. The challenge is not over our land and oil resources this time- it is over the ability to **govern taxation**, the ability to resourcefully manage economic resources, and the ability to regulate and engage in commerce - again resources which benefit our people. For the last 160 years, our Nation has used its powers to build its economies, improve its citizens' quality of life, manage environment and natural resources and pursue goals through the powers of self-government.

So, in the characterization of sovereignty for the Creek Government, we will always be here; we are permanent; this is our homeland, and, we are tenacious.

Consequently, the Muscogee (Creek) Nation will stand tall and use every legal means necessary to hold our ground. Sovereignty is meaningless if we must get approval from the state or Federal Government to govern ourselves. When we are recognized as an equal, then we will be able to come to the negotiating table and work out an agreement consistent with our treaties, the U. S. Constitution, and Federal law. At that point, we will have taken a significant step toward sovereign relations. On the other hand, when laws are passed that violate our treaty and constitutional rights, there is no progress. This is suppression!

As Indian people, we always are aware that sovereignty ensures our identify for future generations. Decisions that I and other tribal leaders make affect future generations. We, in good faith, cannot give away the rights of generations not yet born.

Therefore, with such high stakes, we have to be very cautious when selecting a course of action for Creek people. We realize the Creek government does not exist in a vacuum--separate and alone--but the Federal Government must realize it cannot effectively govern as if it were isolated from Indian people.

Many races live and work side by side. We believe that what we do in the Creek Nation must benefit the whole region: Indian and non-Indian alike, as we have so aptly demonstrated. As we strive to improve the quality of life for our tribal members, it is our philosophy to positively impact the region economically, socially, and culturally. We are contributing to the development and growth of the whole area for all people, and we will continue to do so.

I truly believe by working together, we can achieve much more. Too often, different groups have taken opposing positions rather than co-existing. Ultimately, I conclude that the time is right to get rid of old attitudes and old stereotypes which stand in the way of progress. We need each other for support in this troubling and sometimes bewildering environment.

Indeed, neither all governments nor all people will agree on every issue. We will still have differences of opinion. Nevertheless, we must still come together for the good of human kind.

Sovereignty is not about colonial dominance, dictatorial relationships, and suppresive acts by a dominent society. In government-to-government relations, it is about mutual respect. Sovereignty is workable!

The National Council of the Muscogee (Creek) Nation enacted a Tribal Resolution which opposes any Federal Legislation which would interfere with Indian Tribe's sovereign immunity, tribal self-governance, and place tribal assets and funds at risk. (Copy attached.)

I am also at this time presenting the Position Statement of the Muscogee (Creek) Nation. (Copy attached.)

MUSCOGEE (CREEK) NATIONAL COUNCIL

Creek Capitol Complex · The Mound · Hiway 75 at Loop 56 · PO Box 188
Okmulgee, Ok 74447 · 918/756-1410 · FAX 918/756-6812

Speaker Kenneth L. Childers, Sr Second Speaker Bill S. Fife

STATEMENT OF POSITION OF THE MUSCOGEE (CREEK) NATION ON S. 1691, PROPOSED WAIVER OF SOVEREIGN IMMUNITY OF FEDERALLY RECOGNIZED INDIAN TRIBES

The Muscogee (Creek) Nation, a Federally recognized Indian Nation with approximately over 42,000 citizens, has a jurisdictional area covering all or part of 11 counties in eastern Oklahoma. Like many other tribes in the United States, the Muscogee Nation provides a broad range of social, health and education programs for its Indian citizens. Some of these programs are funded in whole or in part with revenues raised through tribal taxation or from tribal enterprises, and some programs are funded, in whole or in part, from grants and contracts with agencies of the federal government.

Immunity from suit in state and federal courts is one attribute of the inherent sovereignty of Indian tribes which has always been recognized, respected and protected by the United States Government. Senate Bill 1691 would forcibly waive the sovereign immunity of all Indian tribes for claims arising in tort and/or in contract and make tribes amenable to suit in state courts for all such claims. As written, S. 1691 is entirely inconsistent with this long-standing respect for tribal immunity; it is also especially inconsistent with almost 30 years of Federal Indian policy, which has encouraged tribes to govern and provide for themselves. The threat of litigation, the potential loss of tribal assets, and the cost of defending litigation in state court would present a powerful deterrent against engaging in tribal revenue-raising activities and enterprises. The tribes' ability to plan and to manage risks, and to raise revenues to fund governmental functions and services to tribal members, would be substantially impaired.

The "finding" in Section 1. of S. 1691 that over the past century, state governments "have dramatically scaled back the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies," is greatly exaggerated in some instances. For example, the State of Oklahoma imposes a statutory cap on non-medical most such claims against the state at $25,000 per claim for property loss and $100,000 per claim for personal injury, even though the actual damages may greatly exceed these limitations. This is hardly a "dramatic scaling back" of the doctrine.

Most importantly, it has always been left up to the states themselves to decide when, if and to what extent they should waive sovereign immunity. For the Congress to forcibly waive the tribes' immunity from suit is contrary to the Federal Government's policy of fostering tribal self-governance and its responsibility as a fiduciary to protect Indian tribal governments and Indian people.

TR 98-06

CODIFICATION #33. PROCLAMATIONS AND RESOLUTIONS

A RESOLUTION OF THE MUSCOGEE (CREEK) NATION OPPOSING FEDERAL LEGISLATION WHICH WOULD INTERFERE WITH INDIAN TRIBES' SOVEREIGN IMMUNITY, TRIBAL SELF-GOVERNANCE, AND PLACE TRIBAL ASSETS AND FUNDS AT RISK

WHEREAS, The Senate Committee on Indian Affairs has tentatively scheduled the first of three hearings on Indian tribes' sovereign immunity beginning March 11, 1998; and,

WHEREAS, Federal legislation has been drafted which would provide authority for states to sue tribes and-or tribal members in federal court for collection of sales, excise, and use taxes; and,

WHEREAS, This Federal legislation also deals with contracts, torts, civil rights, and land use and would expose tribal land and assets to loss through federal courts.

NOW THEREFORE BE IT RESOLVED THAT:

The Muscogee (Creek) Nation strongly opposes any legislation which would interfere with any Indian tribes' sovereign immunity, tribal self-governance, and place tribal assets and funds at risk.

ENACTED by the Muscogee (Creek) National Council on this **28th day of February 1998.**

IN WITNESS WHEREOF, the Speaker of the Muscogee (Creek) National Council has hereto attached his signature.

Kenneth L. Childers, Speaker
National Council
Muscogee (Creek) Nation

CERTIFICATION

I, the undersigned, certify that the foregoing is a true extract from the minutes of the Muscogee (Creek) National Council comprised of twenty-six members with **Twenty-two** members attending this meeting on the **28th** day of **February 1998**, and that the above is in conformity with the provisions therein adopted by a vote of **21** in favor, **0** against, **0** abstentions, and that said Resolution has not been rescinded or amended in any way and the above is the signature of the Speaker of the National Council.

Ruthie A. Burgess, Recording Secretary
Muscogee (Creek) National Council

APPROVAL

I, the Principal Chief of the Muscogee (Creek) Nation, hereby affix my signature this 4th day of March, 1998, to the above Resolution, **TR 98-06**, authorizing it to become a Resolution under Article VI., Section VI., of the Constitution of the Muscogee (Creek) Nation.

R. Perry Beaver, Principal Chief
Muscogee (Creek) Nation

ONEIDA INDIAN NATION

ONEIDA NATION TERRITORY, VIA ONEIDA, NEW YORK

Statement of Keller George
President of the United South and Eastern Tribes
Assistant to the Nation Representative, Oneida Nation
March 25, 1998

This statement is submitted to the Senate Indian Affairs Committee for inclusion in the record for the hearing held on March 11, 1998 regarding S. 1691.

My name is Keller George. I am President of the United South and Eastern Tribes, and I am an enrolled member of the Oneida Indian Nation in New York where I serve as the Assistant to the Nation Representative. I submit this statement in opposition to S. 1691, specifically section three of that bill, which would allow states to take Indian nations to court for purposes of compelling tribal governments to serve as tax collectors for state governments. This provision would not only abrogate the sovereignty of Indian nations, it would set a dangerous president and embolden those who seek the eventual extinction of tribal governments. Further, the proponents of this measure have grossly overstated the magnitude of the problem and are attempting to impose a federal solution on a problem that can—and has been—adequately addressed at the state and local level.

The petroleum marketers and others who favor this legislation often cite the unresolved cigarette and fuel tax dispute in New York as justification for federal intervention. In making their case, they have distorted the nature of Native American motor fuel businesses and have misrepresented the actions of many New York-based Indian nations.

In all of New York, there are approximately 30 service stations that are owned and operated by either an Indian nation or a Native American entrepreneur. This represents less than one-third of one percent of all gas stations located within the boundaries of the state. Further, the majority of those businesses are situated on reservations in remote locations. More than half are located on the Mohawk reservation near the United States-Canadian border. This is an extremely rural part of the state that sees very little automobile traffic. As to the Oneida Nation, the majority of the patrons of our gas stations are visitors to, and employees of, our casino. These are individuals who, but for the Oneida Nation's casino and other enterprises, would not travel to

PO Box 1 • Vernon, NY 13476
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our reservation. Thus, we are not taking existing customers from existing service stations; rather, we are bringing new customers to the area. Given these facts, the alleged adverse impact of Indian businesses on convenience store owners and petroleum marketers is somewhat hard to understand, especially in light of the sustained growth in the membership of those organizations over the past ten years.

In addition to exaggerating the magnitude of this issue, the petroleum marketers have conveniently overlooked the efforts of the Oneida Nation and other tribal governments to resolve this issue through negotiations with the State of New York. Eighteen states have concluded approximately 200 compacts with Indian nations in this country. The Oneida Nation has been striving to join the ranks of those governments that have successfully resolved this issue through negotiation. In reality, however, the current administration in Albany is the principal reason why several New York-based Indian nations have not been able to come to terms with the state on the subject of fuel and cigarette excise taxes. A brief history of the Oneida Nation's dealings with the State of New York on this matter will serve to illustrate this point.

The Oneida Nation began negotiations with the New York Department of Taxation and Finance in 1992 for purposes of settling the cigarette and fuel excise tax issue. The Seneca Nation of Indians also embarked upon bilateral discussions with the State for purposes of resolving this matter. The Oneida Nation began its talks with the Department at a time when Indian nations were winning most of the court battles in New York with respect to cigarette and fuel taxes. Those court victories notwithstanding, it elected to negotiate an amicable settlement because it believed that, irrespective of the judicial authority on this issue, a permanent and lasting solution could be achieved only through a government-to-government agreement.

By the fall of 1994, the Oneida Nation had exchanged several draft agreements with the Department of Taxation and Finance and had reached an agreement in principle with respect to most issues. In November of that year, however, the citizens of New York elected a new governor, George Pataki. As a result, the Cuomo Administration declined to finalize the Nation's agreement, leaving the matter for Mr. Pataki to resolve.

In May 1995, the Oneida Nation sent a letter to Governor Pataki and the Commissioner of Taxation expressing its desire to return to the negotiating table for purposes of concluding a tax agreement. Five months went by before the Nation received a response to its invitation.

In early 1996, we met for the first time with representatives of the Pataki Administration to discuss cigarette and fuel excise taxes. Many of them were unaware of the Nation's prior negotiations with the Department on this issue and had no knowledge that an agreement in principle had been reached by the parties in the fall of 1994. They promised, however, to study that agreement and provide us with a response.

One week after that meeting, the Department of Taxation and Finance issued an ultimatum to all Indian nations: "Sign a tax agreement within 120 days or else face the prospect of vigorous enforcement." This directive was not well received in Indian country. No Indian nation was willing to negotiate with the State unless the ultimatum was withdrawn; thus, the next four months were devoted to convincing the State to withdraw its threat and deal with the Indian nations on a government-to-government basis. After the Governor finally relented, the parties were able to commence serious discussions on the excise tax issue.

Towards the end of 1996 the Oneida Nation reached an impasse with the State over the issue of revenue sharing. In an effort to resolve that issue and get the negotiations back on track, we contacted the New York Association of Convenience Stores ("NYACS") and the Independent Petroleum Marketers of New York. We had several meetings with representatives of those organizations for purposes of crafting a solution to this issue that we could jointly present to the Governor. Those efforts proved successful and paved the way for the execution of an interim tax agreement between the Oneida Nation and the State on March 31, 1997. Five other Indian nations signed interim agreements with New York with a view towards finalizing a permanent agreement within the next sixty days.

By the end of May, the Oneida Nation had resolved most outstanding issues with the State and was preparing the final draft of a ten-year tax agreement which it was ready to sign at the end of the month. Five other nations were also prepared to sign a permanent agreement with New York. In addition, several of the remaining nations were involved in active discussions with the State for purposes of finding a mutually acceptable solution to this problem. Towards the end of May, however, the Governor abruptly walked away from the negotiations and refused to sign a tax agreement with *any* Indian nation. Instead, he chose to send proposed legislation to the Assembly and the Senate that would exempt all Indian cigarette and fuel sales from State taxes—a proposal that did not find a single sponsor in the legislature. The most commonly accepted explanation for the Governor's behavior is that he perceived the issue was hurting him in the public opinion polls; therefore, he opted to shift the problem to the legislature.

The most recent action taken by the State on this issue occurred last month when the Department of Taxation and Finance formally withdrew and rescinded the excise tax regulations it previously promulgated with respect to sales of gasoline and cigarettes occurring on Indian reservations. *Thus, Indian gas stations and convenience stores in New York are not considered to be operating illegally by the Department.*

Most Indian nations in New York realize that the Governor's lack of leadership on the tax issue does not mean that the problem has been resolved. For this reason, several New York Indian nations participated in a conference in Ithaca, New York on June 27-28, 1997 for purposes of finding a more permanent solution to this issue. The Indian nations invited

representatives of the legislature and NYACS to participate in the conference in order to find common ground for settling their differences on the issue of taxes. Since that conference, the Oneida Nation has hosted other meetings between Indian leaders and representatives of NYACS with the objective of crafting a solution that they can jointly present to the legislature this year. Several leaders in the State Assembly and Senate have pledged their unqualified support for this effort.

The record clearly reflects that several Indian nations in New York are prepared to resolve the tax issue through government-to-government agreements with the State of New York. The Oneida Nation is committed to working towards that goal, either with the Pataki Administration or the State legislature. Senator Gorton's proposal, however, will only undermine our efforts and will likely prolong a dispute that has already taken much too long to resolve. Moreover, section 3 of S. 1691 clearly represents only the first assault on tribal sovereignty that Mr. Gorton has in store for Indian nations.

Thank you for considering my views on this subject. If you desire any additional information regarding this subject, please feel free to contact me (315/829/3090) or the Oneida Nation's Tax Counsel, Eric Facer (202/429-6504) at any time.



HUALAPAI TRIBAL COUNCIL

P.O. BOX 179 • PEACH SPRINGS, ARIZONA 86434 • 602 769-2216

The Great Spirit created Man and Woman in his own image in doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other, in doing so happiness and contentment was achieved then, as it should be now.

The connecting of the Hair makes them one person for happiness or contentment can not be achieved without each other.

The Canyons are represented by the purples in the middle ground where the people were created. These canyons are sacred and should be untreated at all times.

The Reservation is pictured to represent the land that is ours, treat it well.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us.

The Sun is the symbol of life, without it nothing is possible - the plants don't grow - there will be no life - nothing. The Sun also represents the dawn of the Hualapai people. Through hard work determination and education everything is possible and we are assured bigger and brighter days ahead.

The Tracks in the middle represent the coyote and other animals which were here before us.

The Green around the symbol are pine trees, representing our name Hualapai - PEOPLE OF THE TALL PINES -

TESTIMONY OF THE HUALAPAI NATION ON SENATE BILL 1691 105th CONGRESS, SECOND SESSION

I. INTRODUCTION

The Hualapai Nation opposes Senate Bill 1691, the "American Indian Equal Justice Act" ("S.1691"). S.1691 would abrogate the sovereign immunity of Indian tribal governments for all tort claims and contract actions in derogation of existing, well-established federal and tribal law, and without regard for the authority of tribal courts. Contrary to existing law, S.1691 would subject tribal governments to lawsuits in state courts under state law for torts and contracts, it would abrogate tribal sovereign immunity for the collection of state taxes in federal court, and it would create a private cause of action under the Indian Civil Rights Act in federal court for unspecified damages and relief. This ill-conceived bill is an unnecessary breach of numerous sacred treaties and agreements, and it would result in a radical shift of federal law and policy that would make a mockery of the federal trust responsibility to Indian tribes. S.1691 is unnecessary, unwise and should not be passed.

II. BACKGROUND

The Hualapai Nation is a federally recognized Indian tribe organized pursuant to a constitution adopted under the Indian Reorganization Act of 1934

("Tribe"). The Hualapai Tribal Council, which consists of 9 members, is the governing body of the Tribe. The Chairman of the Tribal Council is in charge of the tribal administration. The Tribe has a judicial department which consists of a tribal court and an appellate court. The tribal land base consists of approximately 1 million acres of land in Mohave, Coconino and Yavapai Counties in northwestern Arizona. The Tribe has about 2000 members, many of whom live on the Hualapai Reservation. The tribal headquarters is located at Peach Springs, Arizona. The Tribe owns a Grand Canyon tourist visitation center called Grand Canyon West, a Colorado River rafting company and the Hualapai Lodge, all of which serve over 100,000 domestic and foreign visitors annually. These businesses are operated by the tribal owned Hwal'bay Ba:j Enterprises. The Tribe also has organized federally-chartered business corporations under the Indian Reorganization Act.

III. EXISTING, APPLICABLE FEDERAL AND TRIBAL LAWS AND PRACTICES

The abrogation of tribal sovereign immunity in S.1691 for contract and tort actions in state court under state law is in derogation of the long-standing principles that Indians tribes retain "attributes of sovereignty over both their members and their territory," United States v. Mazurie, 419 U.S. 544 (1975), and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states ...". Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980). S. 1691 breaches these principles as evidenced by the fact that the Tribe has established corporations that have the full authority to make contracts and to provide for arbitration or other alternative dispute resolutions to cover any contractual disputes that may arise. The Tribe has insurance for itself and its corporations for tort actions brought against tribal officials or corporations.

In accordance with the Constitution of the Hualapai Indian Tribe, the Hualapai Tribal Court is authorized and equipped to deal with tort and contract disputes that may arise on the Reservation. With respect to the collection of state taxes, S.1691 is overreaching given the fact that the State of Arizona only recently changed its gasoline tax statute to reach the ultimate non-member consumer on Indian lands. S.1691 affords to states the opportunity to collect taxes that may not be authorized under federal law. Finally, S.1691 creates a cause of action under the Indian Civil Rights Act in a broad manner that fails to take into account the impacts on Indian tribal governments.

In the contractual context, the Tribe has established tribal corporations that have the full authority to make contracts the charters vest authority in the corporation to sue and be sued. The corporation boards can waive any further vestings of tribal sovereign immunity on corporate assets. Under these limited waivers of immunity, the tribal corporation is authorized to pledge the assets of the corporation to satisfy any claims made against it. An injured party also may make claims against the insurance carriers who insure the Tribe and its corporations.

The Tribe's main industry is tourism due to our location along the south rim of the Grand Canyon. The Tribe transacts business with over 100,000 visitors, both domestic and foreign, annually. The Tribe conducts business with major helicopter and airplane operations, as well as bus companies from Las Vegas, Nevada and Phoenix, Arizona who bring visitors to the Reservation. The contracts that the Tribe and its corporations have negotiated and entered into include arbitration and other alternative dispute resolution mechanisms that have served all parties well, based on the fact that there have been no major, unresolved problems or disputes.

With respect to tort claims made against the Tribe, the Tribe and its corporations carry and maintain insurance coverage for governmental and business activities. Equally important, the Tribe does not allow their insurance companies to raise the defense of tribal sovereign immunity to avoid paying claims. This is very important to the Tribe because we seek to protect tribal members as well as those non-members who may be injured in the course of dealing with the Tribe or its corporation.

In addition, the Constitution of the Hualapai Indian Tribe vests the tribal court with jurisdiction over all cases and controversies that arise within the jurisdiction of the Tribe. Therefore, any contractual or tort disputes that cannot be resolved through arbitration or insurance settlement can be heard in the Tribal Court. Cases that cannot be resolved in the trial court can be appealed to the Southwest Intertribal Court of Appeals, based in Albuquerque, New Mexico. Judicial review by an independent appellate court staffed by qualified judges and attorneys ensures that disputes are resolved without any suggestion of bias or conflicts of interest. Based on the current judicial system of the Hualapai Tribe, there is no need for congressional action to abrogate tribal sovereign immunity for tort and contract actions that may be brought against the Tribe or its businesses.

IV. STATE TAXATION

Similarly, there is no need for congressional abrogation of tribal sovereign immunity for actions against Indian tribal governments for the collection of state taxes. Under long-standing principles, Indian tribes and reservation Indians are subject to tribal and federal law, and therefore, Indian tribes are generally exempt from state taxation and regulation in Indian country.

See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). The Supreme Court has stated that:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I. § 8, cl. 3. ... As a corollary to this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Id. at 764. Furthermore, the Supreme Court has ruled that when Indian tribes and individual Indians generate value through economic activities on their reservations, federal law may also preempt state taxation of non-Indians engaged in Indian commerce. For example in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Supreme Court held that non-Indian hunters using a tribal hunting license on reservations lands were exempt from state hunting regulations reasoning that:

> The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. ... The Tribal enterprise ... clearly involves "value generated on the reservations by activities involving the Tribe."

Id. at 340.

By contrast, the Supreme Court has ruled that where Indian tribes or individual tribal retailers sell prepackaged goods to non-Indians, without adding reservation value, the non-Indian consumer may be liable to pay non-discriminatory state taxes whose legal incidence falls on the transaction by the non-member. See Washington v. Colville, 447 U.S. 134 (1980) (prepackaged cigarettes). Though a state's authority to tax in these circumstances does not diminish the Indian tribe's inherent authority to tax the same transaction, it has given rise to the problem of "dual taxation" in Indian country.

To address the dual taxation burdens on commerce and to facilitate tax collection, the Supreme Court has recognized that states and Indian tribes may enter into "mutually satisfactory" tax agreements. See Oklahoma Tax Comm'n v. Citizens Band Potawatomi, 485 U.S. 505, 514 (1991). For example, in March of 1997 the Arizona legislature changed the legal incidence of its motor vehicle use fuel tax to fall on the ultimate consumer, including *all* consumers on Indian lands. Effective January 1998, Arizona's use fuel statute imposes a fuel tax on tribal members of an Indian reservation, but sets forth a burdensome refund procedure for those tribal members to obtain refunds of the taxes that the state is not legally entitled to receive. In lieu of this burdensome technique, the statute sets forth a mechanism for the state and tribe to enter into cooperative agreements for the collection of the tax in a manner that prevents dual taxation of the same transaction. For example, the state may agree to forgo its taxes, and the Indian tribe may retain all tribal taxes from sales to non-Indians, provided that the tribal taxes are at least equal to the amount of state taxes that would otherwise be imposed.

S.1691 would interfere and destroy the cooperation of states and tribes to enter into mutually satisfactory agreements, and in cases where the legal incidence of a particular state tax law does not fall on the ultimate consumer, S.1691 permits a state to sue for taxes that it would not otherwise be entitled to receive. Furthermore, the broad language contained in S.1691 would effectively destroy a tribe's ability to develop and generate value through on-reservation economic activities free of state taxation. Indian tribes need a viable tax base in order to provide essential governmental services and to become self-sufficient. For example, although the Hualapai Tribe does not have mineral production, tribal taxation on transmission lines and the impending lodger's tax are essential to support tribal governmental operations. Further imposition of state taxes on

the Tribe will erode the existing and potential tax base that is absolutely critical for the continued existence of the Tribe. S.1691 sets a dangerous precedent to abrogate tribal sovereign immunity in a manner that obstructs tribal-state cooperative agreements and impedes on-reservation economic development and taxation.

V. INDIAN CIVIL RIGHTS ACT

Under prevailing law, the Indian Civil Rights Act does not provide a waiver of tribal sovereign immunity, but it does make available to any person the right of a writ of habeas corpus in federal court to test the legality of his detention by order of an Indian tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Tribal courts have construed the Indian Civil Rights Act in accordance with federal law. In amending the Indian Civil Rights Act, S.1691 would abrogate tribal sovereign immunity in an extremely broad manner without consultation from the Indian tribes. Any legislation amending the Indian Civil Rights Acts must be accomplished in a manner that preserves tribal governmental solvency, authority and functions in accordance with and respect for tribal laws, customs and institutions.

VI. CONCLUSION

The Hualapai Nation opposes S.1691 because it would abrogate tribal sovereign immunity for tort claims and contract actions in derogation of federal law and policies of promoting tribal self-determination and self-sufficiency. S.1691 disregards existing, well-established federal and tribal law, as well as tribal courts. S.1691 would set a dangerous precedent by exposing tribal government treasuries to private actions in state court, and by subjecting tribal governments to actions for the collection of state taxes that a state might otherwise be barred from collecting. S.1691 is reckless in its abrogation of tribal sovereign immunity for claims under the Indian Civil

Rights Act. Simple logic dictates that such a departure from well-established law requires more thought and analyses on the effects this broad-sweeping abrogation of tribal sovereignty will have on Indian Nations. In accordance with the federal policies of self-determination and self-sufficiency, Congress should pass legislation that builds the necessary tribal infrastructure for tribal courts, business activities, taxation and economic development. Because S.1691 jeopardized tribal governmental solvency, diminishes tribal authority, undercuts the inherent authority of tribal courts, and disregards well-established federal and tribal laws and policies, the Hualapai Nation urges that S.1691 note be passed. Be assured, however, that the Hualapai Nation will work with congress for positive legislation that will better address the concerns raised in S.1691.

THE JICARILLA APACHE TRIBE

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Jicarilla Apache Reservation
February 11, 1887-1987

TESTIMONY OF THE JICARILLA APACHE TRIBE ON TRIBAL SOVEREIGN IMMUNITY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS 105th CONGRESS, SECOND SESSION

I. INTRODUCTION

The Jicarilla Apache Tribe opposes Senate Bill 1691, the so-called "American Justice Equal Justice Act" ("S.1691"). S.1691 would abrogate the sovereign immunity of Indian tribal governments for all tort claims and contract actions in derogation of existing, well-established federal and tribal law, and without regard for tribal courts. S.1691 would subject tribal governments to lawsuits in state courts under state law for torts and contracts, it would abrogate tribal sovereign immunity for the collection of state taxes in federal court, and it would create a cause of action under the Indian Civil Rights Act in federal court for unspecified damages and relief. S.1691 also would abrogate tribal sovereign immunity for actions for the collection of state taxes in a manner that fails to take into account the various ways that Indian tribes contribute to the respective state tax base and in a manner that effectively destroys potential economic development in Indian country. This ill-conceived bill is an unnecessary breach of numerous sacred treaties and agreements, a radical shift in federal law and policy that would make a mockery of the federal trust responsibility to Indian tribes. S.1691 is unnecessary, unwise and should not be passed.

II. BACKGROUND

The Jicarilla Apache Tribe (hereinafter the "Jicarilla Tribe" or "Tribe") is an Indian Nation recognized by the United States government and organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1988). Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The Jicarilla Apache Reservation is located in the northwest quadrant of the state of New Mexico, on the eastern edge of the San Juan Basin, which is the second largest gas field in the lower 48 states. The exterior boundaries of the Reservation have been established by a series of executive orders.[1]

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[1] Exec. Order of February 11, 1887; Exec. Order of November 11, 1907; Exec. Order of January 28, 1908; Proclamation of the Secretary of the Interior dated September 1, 1988, 53 Fed.

(continued...)

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The land area within the exterior boundaries of the Reservation totals approximately 980,000 acres, virtually all of which is held in trust by the United States for the Tribe. The United States holds all minerals under 900,000 of the Reservation's 980,000 acres in trust for the Tribe. The Tribe is the lessor and royalty owner in more than 200 oil and gas mining leases issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-g (1988), for the production of oil and gas from Reservation trust lands. Those leases cover over 300,000 acres (approximately one-third) of the Reservation. By federal law, the Secretary of the Interior expressly is charged with the responsibility of accounting for and collecting royalties and other payments due the Tribe from oil and gas production on our Reservation. Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 et seq. (1988). The Tribe has entered into an agreement with the Department of the Interior's Minerals Management Service for joint audits of oil and gas leases on the Reservation.

There are approximately 3,100 enrolled members of the Jicarilla Apache Tribe who reside both on and off the Reservation. The total reservation population is approximately 3,000 people. The number of non-members living on the reservation is less than 5% of the entire reservation population and consists of people who work for the local schools, the Bureau of Indian Affairs and the tribal government.

The Jicarilla Apache Tribe is the single largest employer in the area of more than 1,000 square miles in northern New Mexico, and we provide scholarship opportunities, elderly assistance, and innumerable other services to our members, as well as search and rescue, fire and police protection, and tribal court review to all within our jurisdiction and neighboring communities. The Tribe relies on revenue from oil and gas production to fund more than 90% of essential governmental services on the Reservation, including the police department, the tribal court, emergency ambulance services, community services, alcoholic rehabilitation, day care services, elderly care, and tribal regulation of oil and gas operations.

The Tribe has entered into contractual arrangements that provide the parties adequate relied and redress under tribal law. The Tribe has a competent and well-staffed tribal court system that is equipped to deal with matters that may arise under tribal contracts or under tort laws. The Tribal Council has carefully considered the issue of sovereign immunity and has provided for limited waivers that protect the tribal treasury as well as tribal authority. Moreover, the tribe contributes immensely to the local and state economies through its governmental and economic activities in spite of the dual taxation issue which plagues Indian country. Rather than

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[1](...continued)
Reg. 37355 (1988); Proclamation of the Secretary of the Interior dated September 1, 1988, 53 Fed. Reg. 37356 (1988).

perpetuating dual taxation on Indian lands, Congress should pass legislation that promotes tribal economic development and prosperity pursuant to the federal policies of tribal self-government and self-sufficiency.

III. JICARILLA APACHE TRIBAL JUDICIAL SYSTEM

Article V of the Revised Constitution of the Jicarilla Apache Tribe sets forth the separation of powers among the legislative, the executive and the judicial departments of the tribal government. Under Article XXIII of the Revised Constitution, the judicial powers of the Tribe are vested in the Jicarilla Apache Tribal Court to exercise jurisdiction over all criminal matters, (except those matters within the exclusive jurisdiction of the federal and state courts) which involve members of the Tribe or non-member Indians. The Jicarilla Apache Tribal Court is vested with the civil jurisdiction in all matters.

Article XXIV of the Revised Constitution governs the composition of the Jicarilla Apache Tribal Court, which includes a trial court and an appellate court. The Tribal Court consists of two permanent judges, a Chief Judge and an Associate Judge, and six pro tempore, all of which are appointed by the President and confirmed by the Tribal Council. The Chief Judge and Associate Judge have juris doctorates and are state-licensed attorneys. The Chief Judge is a member of the San Juan Pueblo and the Associate Judge is a member of the Rosebud Sioux Tribe. Five of the pro tempore judges have law degrees and include a New Mexico state court judge, a former tribal court judge, and experienced practitioners in the field of Indian law and complex federal, tribal and state jurisdiction matters. The non-lawyer trained pro tempore judge has an extensive background with tribal governments and in the area of criminal procedure as a former federal investigator. According to the Article XXIV, Section 3, three members of the Tribal Council designated by the President sit as an appellate court any time an appeal is made from a decision of the trial court.

The Tribal Court staff consists of four divisions including: criminal, civil, domestic and probation. There are two employees in each divisions in addition to the general Tribal Court support staff which consists of a receptionist, an office aid and a court administrator. The Tribal Court budget for FY 1997 was $430,000, which was entirely funded by the Tribe without federal funds. Related court functions include the Tribal Public Defender and the Tribal Prosecutor, both are funded by the Tribe separate from the Tribal Court budget. The services of the Public Defender are available to anyone, both members and non-members, who are subject to the criminal jurisdiction of the Tribal Court, including non-Indians who consent to Tribal Court jurisdiction in lieu of state court prosecution.

The Tribal Court recently developed a bar examination for practice in the Tribal Court which was adopted by the Tribal Council and is scheduled to be implemented in May of 1998.

The Tribal Court is currently in the process of adopting comprehensive rules of evidence and rules of civil procedure. The Tribal Court has a caseload of approximately 4,500 cases both criminal and civil which involve a diverse range of issues including, among others, traffic offenses, game & fish issues, juvenile issues, domestic matters, taxation issues, tort actions, and contract claims.

Non-Indians who reside on the Reservation have filed actions in Tribal Court for legal redress in the area of domestic affairs such as divorces and child welfare matters. In addition, other non-Indians, including bonafide creditors, have filed actions in Tribal Court under the tribal garnishment code for purposes of satisfying of debts and collecting child support and delinquent housing payments. Moreover, non-Indian creditors have filed actions in Tribal Court to recover goods from members who default on a contracts. It is not uncommon for non-Indians to seek legal redress in the Tribal Court for the repossession of goods pursuant to Section 2610 of the Jicarilla Apache Tribal Code.

With respect to tort actions, the Tribal Court has exercised jurisdiction over non-Indians both as defendants and plaintiffs. In fact, the Tribal Court has exercised jurisdiction over a personal injury cause of action between two non-Indians that arose on the Reservation, and the court adjudicated the case to the satisfaction of both non-Indian parties. Similarly, the Tribal Court routinely exercises jurisdiction over contract actions involving non-Indians. For example, the Tribal Court has heard five tax protest cases filed by non-Indian lessees pursuant to the Tribe's oil and gas statute. In each of those cases, the parties, including the non-Indian plaintiffs, accepted the decision of the Tribal Court and did not seek federal or state judicial intervention. One of those cases involved a multi-million dollar complex tax matter involving federal, state and tribal issues. In this complex litigation, the Tribal Court employed a special master (a Utah state district court judge). In another complex litigation matter, the Tribal Court appointed a special master (another state district court judge) in a case relating to a worker's compensation claim.

Both of the permanent Tribal Court judges are actively involved in the state bar judicial activities and have contributed their expertise in the field of Indian law to other judges in the state. For instance the Chief Judge is a member of the State Bar Judicial Tribal-State Forum Committee which deals with jurisdiction issues as between federal, state and tribal judicial forums. The Associate Judge is currently working on revisions on the state child custody code to ensure that it conforms with the provisions of the Indian Child Welfare Act. In addition, the Associate Judge is assisting state district court judges in area of juvenile proceedings involving Indian children and has tailored remedies consistent with respective tribal customs and traditions. Under the Indian Child Welfare Act, the Tribal Court accepts transfers of jurisdiction from state courts involving juvenile adjudications as required by federal law.

We believe that our Tribal Court consistently provides due process and legal remedies for all within our jurisdiction, including members, non-member Indians and non-Indians. S.1691 not only eliminates the jurisdiction of tribal courts which is a core function of tribal self-government, but also it ignores the fact that tribal courts are upholding and strengthening the rule of law by providing due process to those who seek legal redress in our courts.

IV. JICARILLA APACHE TRIBAL COUNCIL ACTIONS REGARDING TRIBAL SOVEREIGN IMMUNITY

Pursuant to Article XI of the Revised Constitution of the Jicarilla Apache Tribe, the inherent powers of the Tribe are vested in the Jicarilla Apache Tribal Council which is authorized to enact ordinances to promote the peace, safety, property, health and general welfare of all of the people of the Reservation. The Jicarilla Apache Tribal Council exercises its constitutional powers subject only to the applicable limitations imposed by the Constitution of the United States, and applicable federal statutes and regulations of the Department of the Interior and restrictions established under the Jicarilla Revised Constitution. As a federally-recognized Indian Nation that possesses inherent powers of self-government over tribal members and tribal territory, the Jicarilla Apache Tribe enjoys tribal sovereign immunity from suit as an aspect of our governmental sovereignty. Under well-settled case law grounded in the Constitution of the United States, only Congress or the Tribe may waive tribal sovereign immunity from suit. See Oklahoma Tax Comm'n v. Citizen Band Potawatomi, 489 U.S. 505, 509 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

According to S.1691, Indian tribal sovereign immunity may frustrate the rights of due process and legal redress of non-Indians, and therefore, may provoke social tension and social turmoil. S.1691 assumes that Indian tribes assert sovereign immunity in all matters involving non-Indians. The findings of S.1691 are unsubstantiated and are simply wrong with respect to the Jicarilla Apache Tribe.

Pursuant to its constitutional powers, the Jicarilla Tribal Council has the authority to waive the Tribe's sovereign immunity, and in fact has done so in a manner that recognizes and protects vested contractual interests, promotes economic development and provides legal redress for parties involved in commercial transactions and tort actions against the Tribe, a tribal entity and tribal employees. For example, the Tribe has established tribal corporations organized under federal charters pursuant to the Indian Reorganization Act as well as state charters for the development of the Tribe's oil and gas interests, the operation of the Tribe's real estate holdings, and the acquisition of trust lands for economic development. The charters of these tribal corporations contain limited waivers of tribal sovereign immunity which limit the Tribe's liability to the assets of the tribal corporation for actions in federal court. This type of limited waiver protects tribal governmental functions and financial solvency.

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Since the late 1970's the Tribe has negotiated various types of agreements with oil and gas companies for the development of the oil and gas reserves on the Reservation, including pipeline rights-of-way agreements. In these contractual arrangements, the Tribe has inserted and bargained for dispute resolution and binding arbitration provisions that are enforceable in federal court, and sometimes in Tribal Court. It has never been necessary for an arbitration hearing to be held because the resolution of conflicts arising from those contractual agreements have been satisfactorily resolved in accordance with the dispute resolution provisions. Furthermore, the satisfaction of the non-Indian companies with these contractual provision is exemplified by the fact that there has been no demand by the non-Indian contractual party for access to state court for further legal redress. The Jicarilla Tribe has never agreed, nor will it ever agree to submit, to state court jurisdiction for matters affecting tribal trust property that arise on the Reservation.

The Jicarilla Tribal Council also has enacted ordinances which waive tribal sovereign immunity for purposes of debt collection, child support payments and delinquent housing payments to be satisfied from tribal wages, per capita distributions and dividend distributions. The tribal garnishment code provides for a limited waiver of tribal sovereign immunity for the sole and limited purpose of authorizing the filing of garnishment proceedings in tribal court by naming the Tribal Controller as defendant for the satisfaction of such debt pursuant to a garnishment order of the tribal court after notice and hearing. The tribal garnishment code demonstrates how the Tribe is undertaking governmental responsibility to enforce money judgments, child support orders and defaults on housing obligations.

In the area of taxation, the Tribe's possessory interest tax ordinance provides a mechanism for an aggrieved taxpayer to file with the tribal Tax Administration Division a protest and request for refund relating to an assessment, a denial of a claim for exemption, a determination of value, or any other matter relating to the tribal possessory interest tax. The tribal Mineral and Water Resources Committee reviews all protests and may receive evidence and hold hearings in a formal or informal manner to make a determination of the protest. The decision of the Committee is subject to review on the record at a hearing before the Tribal Court with further review available before the tribal appellate court. The tribal code provides that where a tax has been found to be erroneous or illegally collected, the tribal Treasurer shall pay interest at the rate of four percent (4%) per annum on the amount refunded. As discussed above, the tribal court has conducted at least five protest appeals and has adjudicated those appeals in a manner satisfactory to the non-Indian taxpayer. There has been no claim of a lack of due process or legal redress in the Jicarilla Tribal Court, nor has there been an attempt to seek federal review of the Jicarilla Tribal Court determinations.

With respect to tort actions against the Tribe or tribal officers, the Jicarilla Tribal Council has established a Tribal Self-Insurance Program by enacting a Risk Management Ordinance in recognition that the Tribe must cover insurable risks in a financially responsible manner. Under

that ordinance the Tribal Council permanently established the Jicarilla Apache Tribal Insurance Claims Fund for the settlement or satisfaction of judgments of civil claims against the Tribe, a tribal entity or tribal employees. Pursuant to the Risk Management Ordinance, the tribal Risk Management Authority has the authority to issue rules and regulations governing the procedures for filing a claim against the Tribal Insurance Fund, and it has the authority to review and decide such claims. The Tribal Court has exclusive jurisdiction over any unresolved claim brought against the Tribal Insurance Claims Fund. The insurance mechanism established by the Jicarilla Tribe insures the tort liability claims against the Tribe, tribal entities and tribal employees up to the amounts of an approved claim or up to the amounts of a judgment rendered by the Tribal Court.

The preceding discussion provides an broad overview of the many protections afforded tribal members, non-member Indians as well as non-Indians under Jicarilla tribal law. Though this discussion is not by any means exhaustive of the laws of the Jicarilla Apache Tribe which protect and address claims made by non-Indians who may enter into contractual agreements with the Tribe, who seek legal redress in the Jicarilla Apache Tribal Court system, and who may be accidentally injured as a result of the actions of the Tribe, a tribal entity or tribal employee, the Tribe believes it provides a strong factual basis to address the inaccurate findings set forth in S.1691. Clearly, the Jicarilla Apache Tribe does not erect a "complete shield from legal claims" made by non-Indians who interact with the Tribe on a daily basis, as declared by S.1691.

V. INDIAN CIVIL RIGHTS ACT

Under prevailing law, the Indian Civil Rights Act does not provide a waiver of tribal sovereign immunity, but it does make available to any person the right of a writ of habeas corpus in federal court to test the legality of his detention by order of an Indian tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Tribal courts have construed the Indian Civil Rights Act in accordance with federal law. In amending the Indian Civil Rights Act, S.1691 would abrogate tribal sovereign immunity in an extremely broad manner without consultation from the Indian tribes. Any legislation amending the Indian Civil Rights Acts must be accomplished in a manner that preserves tribal governmental solvency, authority and functions in accordance with and respect for tribal laws, customs and institutions.

VI. THE CONTRIBUTION OF THE JICARILLA APACHE TRIBE TO STATE

As the lessor and royalty owner in more than 200 federal Indian oil and gas mining leases, the Jicarilla Apache Tribe provides governmental services such as search and rescue, fire and police protection, and tribal court redress to all within our jurisdiction and neighboring communities. The Jicarilla Apache Tribe is the single largest employer in the area of more than 1,000 square miles in northern New Mexico. In New Mexico, four percent (4%) of the natural

gas sales comes from Indian lands and of that percentage approximately seventy-five percent (75%) comes from the tribal oil and gas production on the Jicarilla Apache Reservation.

In addition, the state imposes taxes on non-Indian producers of oil and gas for on Reservation production, and it uses such taxes to fund the state's permanent severance tax fund, which is used to underwrite the issuance of state governmental bonds. The state has assessed and collected hundreds of millions of dollars from the taxation of the non-renewable tribal trust resources, and by comparison, the Tribe receives a fraction of that amount in the delivery of state services. Even though the Tribe's resources are subject to dual-taxation, during the period 1990 through 1994, oil and gas production on the Reservation accounted for over 80 percent of the Tribe's governmental operating revenues. Over half of the Tribe's income from oil and gas activity consists of production royalties. The Tribe relies on revenue from oil and gas production to fund the provision of essential governmental services on the Reservation, including the police department, the tribal court, emergency ambulance services, community services, alcoholic rehabilitation, day care services, elderly care, and tribal regulation of oil and gas operations.

In addition to the existing burdens of dual taxation, S.1691 would abrogate tribal sovereign immunity for purposes of actions for the collection of state excise, use and sales taxes. S.1691 also jeopardizes a potential avenue for economic development that is currently being developing in Indian country. Under United States Supreme Court decisions, when an Indian tribe and individual Indians generate value through economic activities on Indian lands, federal law preempts the imposition of state taxation of non-Indian engaged in such Indian commerce. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (non-Indian hunters using a tribal hunting enterprise on reservation lands are exempt from state hunting regulations); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian engaged in reservation timber production with Indian tribe was exempt from state motor fuel taxation). The broad waiver of tribal sovereign immunity in S.1691 would frustrate the potential of an Indian tribe to develop and pursue economic activities that generate "on-reservation value" free of state taxation.

Rather than continuing to allow Indian tribal governments to be subject to the unfair burdens of dual taxation of the non-renewable tribal trust resources, Congress should put an end to state taxation of tribal trust resources. The demise of dual taxation will strengthen and empower tribal self-government within the framework of government-to-government relations between the federal government and Indian tribal governments, and in a manner consistent with the federal policy of self-determination and self-sufficiency.

VII. CONCLUSION

The Jicarilla Apache Tribe opposes S.1691 because it would abrogate tribal sovereign immunity for all tort claims and contract actions in derogation of federal law and policies of

promoting tribal self-determination and self-sufficiency. S.1691 disregards existing, well-established federal and tribal law, as well as tribal courts. S.1691 would set a dangerous precedent by exposing tribal governmental treasuries to private actions in state court, and by subjecting tribal governments to actions for the collection of state taxes that a state might otherwise be barred from collecting. Therefore, the Jicarilla Apache Tribe urges that S.1691 not be passed is reckless in its abrogation of tribal sovereign immunity for claims under the Indian Civil Rights Act. The Jicarilla Apache Tribe appreciates the opportunity to present our views on the extremely important subject of tribal sovereign immunity.

WRITTEN TESTIMONY OF GILBERT JONES, SR.

PRESIDENT, FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY

ON BEHALF OF THE

THE FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY

BEFORE THE

SENATE INDIAN AFFAIRS COMMITTEE
HEARING ON NATIVE AMERICAN SOVEREIGN AUTHORITY AND IMMUNITY

March 20, 1998

I. INTRODUCTION

On March 11, 1998 the Senate Indian Affairs Committee held an Oversight Hearing on Tribal Sovereignty. The Fort McDowell Mohave-Apache Indian Community ("Fort McDowell" or "Tribe") hereby submits the following testimony regarding Tribal Sovereignty and taxation.

On February 27, 1998, Senator Slade Gorton introduced S. 1691 entitled the "American Indian Equal Justice Act." This bill primarily affects Tribal sovereign immunity and State taxes imposed on reservations. Although the Tribe understands that the Oversight Hearing on Tribal Sovereignty was not a hearing on Senator Gorton's bill, an analysis of the Senator's bill will be extremely useful when considering these issues. Moreover, although the stated topic of this hearing is taxation and contracts, Fort McDowell believes that the taxation issues cannot be considered separately from the tort issues. Therefore, this testimony includes a discussion of the tort issues as well.

Although Senator Gorton has labeled S. 1691 the benevolent title of the "American Indian Equal Justice Act," as will be explained, the contents of this bill would have serious negative impacts on Tribes, possibly devastating impacts. For this reason, the Tribe believes a more accurate title for S. 1691 would be the "**TRIBAL GOVERNMENT ELIMINATION ACT**." Although this bill purports to simply protect individuals that have dealings with Indian Tribes, this bill is degrading, the bill's impact will be extremely harmful to Tribes, and the bill has not been narrowly tailored to solve the alleged problems. As we will describe below, S. 1691's treatment of taxation and sovereignty issues delivers a serious one-two knockout punch to Tribal governments.

II. BRIEF HISTORY OF THE ORIGINS SOVEREIGNTY

The testimony of Mr. David Kwail, President of the Inter-Tribal Council of Arizona and Chairman of the Yavapai-Apache Nation gives a good, short history of the origins of sovereignty. Fort McDowell encourages this Committee to carefully take note of that testimony.

As is described in detail in this testimony, Indian Nations have always been considered as distinct, independent, political communities.[1] When discussing the sovereignty of Indian Nations, Chief Justice Marshall stated "the settled doctrine of the law of Nations is that a weaker power does not surrender its indepedence - its right to self-government, by associating with a stronger and taking its protections." [2] Treaties signed by the Unites States and individual tribes explicitly recognized this fact.[3] Indian Nations did not and will not surrender their right to self-government. In modern times it is far too easy, convenient, and sometimes profitable to forget the fact that Indian Nations are, in fact, governments.

III. CONTRACT ISSUES

Fort McDowell views any efforts to eliminate sovereign immunity of the Tribes in contractual relations as contrary to common sense, the law, and the history of this Nation. Accordingly, the Tribe will not devote a significant amount of time to that issue in this testimony.

In contractual relationships, parties are free to negotiate terms and conditions satisfactory to both parties. If an agreement cannot be reached, the parties do not enter into the contract. Therefore, a federally mandated waiver of the Tribes' sovereign immunity is not necessary in contract cases.

As a general rule, Fort McDowell does not waive its sovereign immunity in contracts. This is especially true with regard to smaller agreements. The Tribe has made a policy decision that it is willing to pay a little more for the contract initially than to subject itself to a lawsuit, especially for small agreements. Often times, the legal fees could easily outweigh the face amount of the contract. However, the Tribe does not, in fact, pay more for most contracts. This is true because the Fort McDowell enjoys a good business reputation in the local community. The Tribe realizes that a good reputation is important and it deals with vendors in a fair manner. Even when a conflict arises out of an agreement in which the Tribe has not waived its immunity, the Tribe rarely raises sovereign immunity as a defense. Instead, the Tribe prefers to negotiate the problem on the merits. Why? Because it would not be good business practice and raising sovereign

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[1] *Worcester v. Georgia*, 31 U.S. (6Pet.) 515, 559 (1832).

[2] *Id.*

[3] *See Id.* at 555 ("This treaty thus explicitly recognizes the national character of the Cherokees, and their right of self-government.)

immunity would ultimately hurt the reputation of the Tribe and discourage companies from doing business on the Reservation.

IV. TAX ISSUES

A. S. 1691 AND THE CURRENT STATE OF THE LAW

Section 3 of S. 1691, the **TRIBAL GOVERNMENT ELIMINATION ACT** requires that:

> An Indian tribe, tribal corporation, or member of an Indian tribe, shall collect, and remit to a State, any excise, use, or sales tax imposed by the state on nonmembers of the Indian tribe as a consequence of the purchase of goods or services by the nonmember from the Indian tribe, tribal corporation, or member.

In the federal context, the Federal Torts Claim Act was enacted to reflect a strong public policy to protect the citizenry from torts committed by public servants, to lift the risks that may be ruinous if left to lie upon individual victims of particular accidents, and *to achieve allocation and apportionment of loss among the entire federal taxpaying public.*[4] The obvious problem with applying this policy to the Tribes is that their ability to tax and raise funds has been seriously undermined.

There are, of course, a handful of Tribes that currently have the resources to shoulder the burden that S. 1691 would impose. However, the vast majority of Tribes are not as fortunate, and those Tribes and would eventually be devastated by this bill.

Although current caselaw imposes certain limitations on the imposition of state taxes on reservations, S.1691 would appear to eliminate any limitations. Presently, if a tribal enterprise produced goods on the reservation and then sold those tribally produced goods to nonmembers on the reservation, it is doubtful that the State could impose a sales tax or similar tax on that sale. At the other end of the spectrum, if a Tribe or other retailer on the reservation purchases goods from off the reservation, such as cigarettes, and resells those goods to nonmembers on the reservation, it is likely under current caselaw that the State could impose its taxes. S. 1691 appears to authorize State taxes for either case.

Tribes have, of course, strongly opposed the imposition of any State sales tax and all other State taxes on the reservations. As the Committee knows, Tribes are governments that have a duty and obligation to care for its members, just like any other government. These duties include, among other things, building and maintaining roads, providing health care, providing programs for the elderly and youth, and providing police and fire services. When States are allowed to

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[4] *See Platis v. United States*, 288 F.Supp 254 (D.C. Utah 1968) *aff'd* 409 F.2d 1009 (10th Cir. 1960)(emphasis added).

impose their taxes on reservations, Tribes are prevented from raising revenue by the means that most other governments can raise revenue - by taxes.

Although States may feel like they have a right to tax activities on reservations, basic fairness mandates that they should not. An analogous situation arises when, for example, citizens of one State (State #1) cross the state border into another State (State #2). State #1 cannot impose its state sales tax for the sales occurring in State #2, nor could State #1 impose a property tax or other possessory interest tax for property held in State #2 by citizens of State #1. Some States have attempted to get around the prohibition of taxing interstate commerce by imposing "use" taxes on their citizens. However, these "use" taxes are generally poorly enforced by States. Since Tribes are not subdivisions of the State, States should not be allowed to tax any sales or property interests on reservations.

Tribes should also be able to impose their own income taxes in place of the State income taxes. When a citizen of State #1 works across the border in State #2, State #2 would impose its income tax on that employee and the treasury of State #2 would keep that money. In contrast, when a citizen of a State works on a reservation, the State will impose its income tax on everyone except member Indians working on their own reservation. The State treasury will unfairly receive the revenue.

Fort McDowell employs approximately 1600 persons in its government and in economic enterprises. Less than 300 of these employees are Native American and not all of those are Tribal Members. Therefore, more than 1300 employees on the reservation pay State income tax to the State of Arizona. It is a popular misconception that substantial State tax dollars are used to support reservation activities and Indian people. The reality, however, is that there is a giant sucking sound, but that sound is the States taking tax dollars away from the Tribes.

B. THE SUPREME COURT CASES AUTHORIZING THE IMPOSITION OF STATE TAXES ON RESERVATIONS SHOULD BE REVERSED

Testimony of persons before this Committee have referred to Tribes as tax evaders. Although these persons are correct in stating that the Supreme Court has upheld the authority of States to impose taxes on reservation under certain circumstances, that does not make those court decisions good public policy. Two hundred years of federal and state hostility, neglect, termination and paternalism have devastated Indian Tribes. As such, Tribes need tax revenue and revenue from other sources such as economic development to provide basic needs for their members. Moreover, in these times of shrinking federal funds, the Tribes cannot rely on the federal government to fill these needs. Tribes must be given opportunities to raise funds to pay for these needs through the imposition of taxes.

It seems peculiar that the most obvious source of revenue for governments - taxation - has been taken away from Tribes. Tribes should be allowed to tax, or not tax (i.e. give a tax break to a company) in order to raise revenue to provide for the general welfare of their people. The

Federal government should not attempt to place restrictions on this ability because of the varying situations of the five hundred plus Tribes.

It is apparent that the anti-Tribal testimony before this Committee boiled down to the fact that certain companies and industries feel that they are at a competitive disadvantage with the Tribes. The real disadvantage is the current tax scheme that courts have handed down to Tribes. This Committee can find other solutions to this perceived problem without subjecting Tribes to unfair lawsuits in federal court.

Although the Tribe does not advocate the following approach, a relatively recent cigarette tax initiative passed in Arizona attempted to balance these competing interests. The Arizona Tobacco Tax and Health Care Act imposed, among other things, a two cent per cigarette tax on cigarettes. This Act provided that if a Tribe enacted a tax equal to or greater than the State tax, the Tribe would keep the revenue from sales on the Reservations. This particular Act was objectionable to Tribes because it permitted too much interference by the State in Tribal affairs and imposes the States laws on the Tribes. However, since an equal or greater tax is imposed by the Tribe under the Arizona Cigarette Act, the concerns regarding unfair competition would be eliminated.

Again, the Tribe is not advocating this particular solution. Some Tribes are in extremely remote locations and an "equal" tax would certainly put them at a competitive disadvantage. However, this example illustrates that there are alternative solutions to alleviating the concerns of competitors of the Tribes' economic enterprises other than authorizing an intrusive suit against the Tribes in federal court.

V. THE DIMINISHMENT OF THE SOVEREIGN RIGHTS AND ABILITIES OF TRIBAL GOVERNMENTS.

A. EACH SOVEREIGN ADOPTS A DIFFERENT VERSION OF A TORTS CLAIM ACT TO MEET THEIR PARTICULAR NEEDS, A ONE SIZE FITS ALL APPROACH WILL NOT WORK

The final knockout punch of S. 1691, the **TRIBAL GOVERNMENT ELIMINATION ACT** is the provisions that broadly waives the Tribes' sovereign immunity. The waiver of immunity contained in S. 1691 may be the most broad waiver of governmental immunity in this Country.

The Federal Torts Claim Act ("FTCA") appears to be a broad waiver of immunity. Some States have adopted broad waivers of immunity and others have narrowly tailored their waivers of immunity. Senator Gorton's home state of Washington has adopted one of the broadest waivers of sovereign immunity in the Country.[5] Other states have adopted much more

[5] *See Savage v. State*, 899 P.2d 1270 (Wash. 1995).

limited waivers and have required a Plaintiff to strictly adhere to certain procedures and time-lines, or lose their claim.

The Torts Claim Act of the State of Arizona, for example, contains numerous exceptions to its waiver of immunity. Under Arizona law, a public entity is absolutely immune and not liable for judicial or legislative functions and the determination of fundamental government policy. A determination of a fundamental governmental policy includes, but is not limited to, the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel, the provision of governmental services, a determination of whether and how to spend existing resources, and licensing and regulation of any profession or occupation.[6] Arizona law also provides qualified immunity. Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither the public entity nor the public employee is liable under nine specific circumstances.[7] All common law immunities are also reserved under the Arizona Torts Claim Act.[8]

Besides the immunities mentioned in the above paragraph, Arizona imposes other restrictions, limitations and requirements on claimants against the State. The Statute of Limitations is lowered from two years to one year for any claim against the State.[9] Also, a claimant must file a claim with the State within One-Hundred Eighty (180) days after the cause of action accrues. Any claim which is not filed within One-Hundred Eighty days is barred and no action may be maintained.[10] Finally, punitive and exemplary damages are not allowed.[11]

Another example of a State that has narrowly tailored its waiver of immunity is the State of Oklahoma. The Oklahoma statute states:

> [t]he State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The State, its political subdivisions, and all their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts. The State, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the State to waive any

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[6] *See* ARIZ REV. STAT. § 12-820.01.

[7] *See* ARIZ REV. STAT. § 12-820.02.

[8] *See* ARIZ REV. STAT. §12-820.05.

[9] *See* ARIZ REV. STAT. § 12-821.

[10] *See* ARIZ REV. STAT. § 12-821.01.

[11] *See* ARIZ REV. STAT. § 12-820.04.

rights under the 11th Amendment to the United States Constitution " [12]

The Oklahoma Statute effective July 1, 1998 will list thirty two (32) exemptions to its waiver of immunity [13] Oklahoma law also limits recovery for each act, accident or occurrence to: 1) $25,000 for loss of property, 2) $100,000 for any other loss, and 3) $1,000,000 for any number of claims arising out of a single occurrence or accident.[14] Punitive and exemplary damages are not permitted Claims must be presented within one (1) year that the date of the loss occurs.[15]

The fact that each sovereign has balanced the interests of compensating victims with the interest of protecting the government, its dignity, and its treasury and each sovereign has adopted varying degrees of waivers highlights the point that a one size fits all waiver does not work. Each sovereign or government has their own needs and capabilities. The State of Washington has adopted a broad waiver, the State of Arizona's waiver might be characterized as middle of the road, and the State of Oklahoma appears to have adopted a very limited waiver.

Likewise, each Tribe should be allowed to consider their own needs and capabilities. Fort McDowell, for example, has purchased general liability insurance for its government activities and its economic enterprises. The insurance policies contain riders that prohibit the insurance company from raising the defense of governmental immunity. The Tribal Council is also considering adopting a Tribal Torts Claim Act, which would, among other things, codify the requirement that the insurance companies cannot raise the defense of governmental immunity. The proposed Tribal Torts Claim Act incorporates many or the provisions of the Arizona Torts Claim Act. Like the State of Oklahoma Torts Claim Act, the proposed Act also places limitations on the dollar amount of recovery, although the maximum recoveries will likely be higher than those set forth in the Oklahoma statute.

B. EACH SOVEREIGN REQUIRES THAT AN ACTION BE BROUGHT ONLY IN THE COURTS OF THAT PARTICULAR JURISDICTION AND IN THE VENUE THAT IS CONVENIENT TO THE SOVEREIGN.

The **TRIBAL GOVERNMENT ELIMINATION ACT** delivers another blow to the Tribes regarding the choice of forum and venue issues. Each of the four Torts Claims Acts that the Tribe analyzed for this testimony contained provisions that all claims could only be brought in the court of that sovereign. For example, the Attorney General of the United States is authorized

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[12] Okla. Stat. Ann. tit. 51 §152.1.

[13] Okla. Stat. Ann. tit. 51 § 156.

[14] Okla. Stat. Ann. tit. 51 § 154.

[15] Okla. Stat. Ann. tit. 51 § 156.

to remove any claim brought in state court to the Federal District Court.[16] Moreover, each sovereign also controls the venue of the claim. For example, the Attorney General of the State of Arizona may remove any action filed in another part of the State to Maricopa County.[17] In contrast, S. 1691 allows claims to be brought against Tribes in either State or Federal Court. Claims do not have to be filed in Tribal Court and there is no consideration regarding the venue of the lawsuit. This smacks in the face of current caselaw and the federal policy of Indian sovereignty and self-determination.

The "findings" of S.1691 state that "for more than a century, the Government of the United States and the States have dramatically scaled by the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies." Although it is true that the U.S. Government and the States in varying degrees have scaled back their use of sovereign immunity, this scaling back is authorized only within their own respective court systems.

As this Committee is well aware, the States possess sovereign immunity protection under the Eleventh Amendment of the Constitution.[18] The Eleventh Amendment presupposes that each state is a sovereign entity in the federal system and that it is inherent in the nature of sovereignty not to be amenable to suit without a State's consent.[19] The Eleventh Amendment largely shields states from suit in federal court without their consent, leaving parties with claims against state to present them, if the state permits, in state's own tribunals.[20] The impetus for Eleventh Amendment is the prevention of federal court judgments that must be paid out of state's treasury.[21] The Eleventh Amendment also protects States from the burden of discovery.[22] However, the Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of state's treasury; it also serves to avoid the indignity of

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[16] *See* 28 U.S.C. § 2679.

[17] *See* A.R.S. § 12-822.

[18] *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).

[19] *Id.* at 1122.

[20] *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 400, 513 U.S. 30 (1994).

[21] *Id.; See Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993) cert. denied, 114 S.Ct 1071(A suit in federal court by private party seeking to impose liability which must be paid from public funds in state treasury is barred by the Eleventh Amendment; this bar against suit also extends to state officials acting in their official capacities.).

[22] *See University of Texas at Austin v. Uratil*, 96 F.3d 1337, 1340 (10th Cir. 1996).

subjecting the state to the coercive process of judicial tribunals at the instance of private parties.[23]

Courts have long recognized that Tribes are sovereign nations. Chief Justice Marshall, in *Worcester v. Georgia*[24] stated:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial . . .
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . .
>
> The treaties and laws of the United States contemplate the Indian territories as completely separate from that of the states.

Undoubtably it is unfair to subject a state's treasury and its dignity to a foreign court, including the federal court. Treating the Tribes differently from the States in this regard would be unfair, unjust, and would be a callous disregard of the Tribes' dignity. If Congress thinks that a waiver of the Tribes' immunity is necessary, that waiver must only be effective in the Tribal Courts. Judicial review of Tribal Court decisions is neither proper nor necessary.

A waiver of the Tribes' sovereign immunity in State Court is completely unacceptable. Often times, Tribes' and States' interests are adverse. These adverse interests often preclude the Tribes from receiving a fair forum in State Courts. Moreover, State judges are more likely to be biased in favor of the non-Indian party than their federal counterparts. The Honorable William C Canby in his Nutshell on American Indian Law discussed the inherent strained relationship between Tribes and States and the origins of Tribal sovereignty:

> During the colonization of America, the British Crown dealt with the Indian tribes formally as a foreign sovereign nations. Britain and several of its colonies entered treaties with various tribes. As the colonies grew in strength and population, it became apparent that individual colonists were encroaching upon Indian lands and were otherwise treating the Indians unfairly or worse. In order to avoid prolonged and expensive Indian wars, and perhaps also to enforce a measure of justice, the Crown increasingly assumed the position of protector of the tribes from the excesses of the colonists. It is accordingly not surprising that when the colonies

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[23] *Seminole v. Florida*, 116 S.Ct. at 1124; *See also Sherwinski v. Peterson*, 98 F.3d 849, 851 (5th Cir 1996)(The object and purpose of the Eleventh Amendment is to prevent the indignity of subjecting a state to coercive process of judicial tribunals at the instance of private parties.).

[24] 31 U.S. (6Pet.) 515, 557, 559, 561 (1832).

> revolted from Britain, nearly all of the tribes allied themselves with the Crown.
>
> Upon independence, the new nation found itself with the same problems of non-Indian aggression and threatened Indian retaliation that had faced the Crown. If Indian affairs were left to the individual states, non-Indian land hunger would almost certainly result in new Indian wars that the exhausted United States was in no position to fight. If stability were to be achieved, it had to be by placing Indian affairs in the hands of the central government. After a period of uncertainty under the Articles of Confederation, the Constitution did just that.[25]

This natural tension is spelled out by Chief Justice Marshall in 1832 in *Worcester v. Georgia*.[26] Over fifty years later, in *United States v. Kagama*, the Supreme Court again recognized this tension and stated:

> [Indian nations] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty to protection, and with it the power.[27]

If anyone seriously believes the States have become more objective and benevolent toward Indian Nations, Fort McDowell has some swamp land here in the desert for sale to that person. Although non-Indians may not be hungering for the Tribes' land at this time, testimony before this Committee certainly indicates companies are hungry for profits and States are hungry for tax dollars all at the expense of Tribal governments.

If Congress allows any review of Tribal Court decisions at all, that review must only be in the federal courts and the federal courts must give deference to the Tribal Courts. **In its current form, it is sad to note S. 1691 would relegate Tribal Courts to something less that administrative bodies of federal and state governments.** Under the Federal Administrative Procedures Act, a reviewing court may set aside an agency's findings of fact which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. State courts normally review state administrative bodies' decisions with deference as well.[28]

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[25] William C. Canby, Jr., American Indian Law in a nutshell, 10 (1981).

[26] *See generally Worcerster v. Georgia*, 31 U.S. (6Pet.) at 557.

[27] 6 S.Ct. 1109, 1113-1114 (1886).

[28] *See e.g. Schillerstrom v. State*, 885 P.2d 156 (Ariz. App. Div. 1 1994)(Trial Court must find that there was no substantial evidence to support the agency decision, or that the agency

S. 1691 would give no deference to tribal courts In fact, Under S. 1691 claimants would not be required to file in Tribal Court at all. S. 1691 would take away a significant portion of the Tribal Courts jurisdiction. It is hard to put into words the indignity that this bill places on the Tribe. Unless Tribal Courts are utilized, they will never achieve the respect that they deserve and require. This action would, in no way, further the stated federal goal of furthering Tribal self-sufficiency and strong tribal governments.[29]

The provisions of S. 1691 allowing claims in state and federal court also appears to eliminate the rule of Tribal exhaustion of remedies set forth by the United States Supreme Court, one of the those few favorable court decisions that exist today.[30] Under current caselaw, persons with claims against the tribe must exhaust their tribal court remedies by bringing the action in tribal court in the first instance.[31]

C. THE "FINDING" OF S.1691 THAT "THE ONLY REMAINING GOVERNMENTS IN THE UNITED STATES THAT MAINTAIN AND ASSERT THE FULL SCOPE OF IMMUNITY FROM LAWSUITS ARE INDIAN GOVERNMENTS" IS FALSE AND MISLEADING.

First, numerous Tribes throughout the Country have adopted limitations to their use of the defense of sovereign immunity. As stated above, Fort McDowell's general liability insurance policies contain riders that the insurance carriers cannot raise governmental immunity. Moreover, the Tribal Tort Claim Act that the Fort McDowell is considering at this time has been modeled after an existing Torts Claim Act of the White Mountain Apache Tribe of Arizona.

Next, States continue to use the defense of sovereign immunity in contexts that many people would find objectionable. Most of the examples cited herein involve the States being sued in Courts other than their own State Courts. However, this only highlights that fact that it is wrong to subject a sovereign to suits in foreign Courts.

The most obvious example is the recent case of *Seminole Tribe of Florida v. Florida*.[32] The State of Florida raised its 11th Amendment sovereign immunity defense and prevailed against

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acted arbitrary, capriciously, or abused its discretion).

[29] *See* 25 U.S.C. § 2702(1)(Congressional declaration of policy under the Indian Gaming Regulatory Act).

[30] *See National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

[31] *See Id.* at 856.

[32] *See* 116 S.Ct. 1114 (1996).

the Tribe. Unless Secretarial procedures are adopted and allowed, or the Justice Department brings a lawsuit on behalf of Tribes, this decision appears to have left the Tribe with no remedy to enforce their rights under the federal statute. Other examples of States successfully using their sovereign immunity to bar claims include:

1) An action against the State of Illinois by elderly persons who suffered from Alzheimer, dementia, or organic brain dysfunctions to obtain home health care benefits provided by Illinois Department of Aging.[33]

2) An action against the State of Maine by AFDC recipients who should have received child support collected by State through interception of tax refunds.[34]

3) An action against the State of Minnesota under title VI and title IX alleging race and sex discrimination.[35]

4) An action brought against the State of Alaska in federal court by the owners of Native allotment to quiet title to a right-of-way asserted by the State over the allotment and for money damages against the State for trespass. Action dismissed notwithstanding owner's claim that dismissal of action based on sovereign immunity would deny them any forum for a takings claim.[36]

5) An action brought against the State of Connecticut for reimbursement of Medicaid hospital charges under the Borden Amendment.[37]

6) An action against the State of Hawaii alleging breach of trust and violation of Hawaiian homeland lessees' rights by approving third-party agreements permitting agricultural use of homelands by non-native Hawaiians.[38]

7) An action against the State of Montana alleging violations of the Montana

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[33] *See Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994) rehearing and suggestion for rehearing denied, cert. denied, 115 S.Ct. 204 (1994).

[34] *See Doucette v. Ives*, 947 F.2d 21 (1st Cir. 1991).

[35] *See Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995).

[36] *See Harrison v. Hickel*, 6 F.3d 134 (9th Cir. 1993).

[37] *See Connecticut Hosp. Ass'n v. Weicher*, 46 F.3d 211 (2nd Cir. 1995).

[38] *See Han v. United States Dept. Of Justice*, 45 F.3d 333 (9th Cir. 1995).

Environmental Policy Act. [39]

8) An action against the State of New Mexico alleging sex discrimination. [40]

9) An action against the State of New York alleging nonpayment of workers compensation award. [41]

10) An action brought against the State of Arizona by inmates to recover minimum wages under Arizona law.[42]

11) An action against the State of Pennsylvania alleging age discrimination against the state while acting in its capacity as an employment agency under the Age Discrimination Employment Act.[43]

12) An action against the State of Washington by a seaman and his wife for negligence and loss of consortium under the Jones Act.[44]

The Tribe cites to these examples not to argue that the Tribe wants to mistreat claimants or deny claimants a fair forum. Rather, the Tribe cites to these examples to illustrate that when read in isolation and without all the facts, many reported cases will appear to be unjust. Moreover, these cases also illustrate that States aggressively use their sovereign immunity in courts of other jurisdictions, even when its use may deny a claimant any other remedy or forum. This use is allowed, and even cheered, by advocates of States' rights because of the indignity of subjecting a State to the jurisdiction of another sovereign and the risk to the State's treasury. The Tribes must be afforded the same dignity and their limited treasuries must be protected.

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[39] *See Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992).

[40] *See Whitney v. State of New Mexico*, 113 F.3d 1170 (10th Cir. 1997).

[41] *See Lipofsky v. Steingut*, 86 F.3d 15 (2nd Cir. 1996), cert denied, 117 S.Ct. 401 (1996); *See also Santiago v. N.Y. State Dept. Of Corrections Services*, 945 F.2d 25 (2nd Cir. 1991), cert. denied, 112 S.Ct. 1168 (Public employees claim for emotional distress barred by 11th Amendment).

[42] *See Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320 (9th Cir. 1991).

[43] *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3rd Cir. 1996).

[44] *See Micomonaco v. State of Washington*, 45 F.3d 316 (9th Cir. 1995).

IV. CONCLUSION

S. 1691 would expand damaging court decisions regarding the taxing authority of States for sales on the reservations while at the same time significantly increasing the Tribes' exposure to liability. If Congress does not reverse and remedy the incorrect court decisions regarding taxation, Tribes cannot spread the burden among taxpayers. If left with no tax base, only a small fraction of Tribes could shoulder the burden of this bill.[45]

If Congress considers imposing the enormous burden that a broad the waiver of immunity would impose, Congress must give Tribes full autonomy and full taxing authority. For all activities and ownership within the boundaries of the reservation, States should have no authority to tax. If a State's authority to tax on reservations is prohibited, which makes good policy sense, Tribes could not be labeled the derogatory term of "tax evaders." This prohibition should include, but not be limited to, any and all sales on the reservations, income earned on the reservations, and any property interests owned on the reservations. Tribes taxing authority must apply regardless of the nature of the buyer, the seller, the owner, or the employee (e.g. Tribal member, other native American or non-Indian). When this happens, when Tribes are treated as sovereigns as was intended when this Country was formed, then Congress can impose obligations expected of other sovereigns of this Nation.

The United States Supreme Court and lower federal courts are generally not friendly forums for Tribes, especially in the last thirty or forty years. These courts have steadily eroded the Tribes' sovereignty. However, the Supreme Court has consistently recognized the basic principle of Tribes as sovereign governments. Although States have been successful in the Courts in taking away the Tribes' sovereignty in a number of areas, including taxation, S. 1691 seeks to reverse the small minority of Supreme Court decisions favorable to Tribes.

The constant onslaught of unfavorable court decisions and efforts by Congress to reverse the few favorable court decisions is discouraging and disheartening to Tribes. Although the concept of a "trust relationship" is often used to describe the relationship between the federal government and the Tribes, that concept is hollow in practice. This is true especially in the last few years as members of Congress constantly assault the Tribes and any progress of the Tribes.

The Fort McDowell Mohave-Apache Indian Community, therefore, respectfully requests that this Committee reject the **TRIBAL GOVERNMENT ELIMINATION ACT** or any other like efforts to eliminate the Tribes' sovereignty under the laws of the United States and any efforts to expand the taxing authority of states over Tribes.

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[45] Even assuming that Congress were to adopt a bill granting full taxing authority to Tribes, many Tribes would still be unable to generate any significant revenue because of their remote locations.

TESTIMONY

STATEMENT OF CHARLES W. MURPHY, CHAIRMAN

STANDING ROCK SIOUX TRIBE

FORT YATES, NORTH DAKOTA

BEFORE THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS

MARCH 23, 1998

Chairman Nighthorse Campbell and Committee members, my name is Charles Murphy, and I serve as Chairman of the Standing Rock Sioux Tribe. Standing Rock is a signatory of the Treaty of Fort Laramie of April 29, 1868. Our existing Reservation is comprised of 2.3 million acres in the northern great plains. Over seven thousand of our Tribal members remain on our Reservation, where we exercise self government and work to develop economically, while retaining our cultural and traditional ways in a modern and rapidly changing world.

I appreciate the opportunity to present testimony in opposition to S. 1691, a bill that is wrongly entitled the "American Indian Equal Justice Act." This bill re-writes history and would mark a serious shift in federal policy toward Indians. My remarks shall focus on these two, related points.

The Standing Rock Sioux Tribe is committed to retaining our culture and history, and our treaty rights. In fact, our Reservation is home to some of the most dramatic events in United States history. Our band of the Lakota Nation is the Hunkpapa, and the most prominent of our chiefs was Sitting Bull. In 1871, gold was discovered in the Black Hills of present-day South Dakota, but this land was reserved by the Sioux Nation in the 1868 Treaty. Nevertheless, General Custer violated the treaty and led an expedition into the Black Hills in 1874. Sitting Bull drove him out and resoundingly defeated Custer at Little Big Horn on June 25, 1876.

U.S. Commissioner George Manypenny convinced many of the Sioux bands to return to the Indian Agencies to receive subsistence rations. But Sitting Bull's band of Hunkpapa remained in the traditional buffalo hunting grounds, in an area of present-day

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Wyoming and eastern Montana reserved by the Sioux in the 1868 treaty as unceded territory. The Army chased the Hunkpapas north and for several years we remained in Canada. The buffalo had been killed off by the movement westward by the whites, intensified by the construction of the transcontinental railroad, completed in 1869. The buffalo gone, chased by U.S. Cavalry raids, and starving, Sitting Bull returned to the U.S. and agreed to reside on the Reservation. Soon after, on December 15, 1890, Sitting Bull, the last Indian leader in North America to submit to government authority, was shot at his home along the Grand River on the Standing Rock Reservation.

The point, Mr. Chairman, is that there is a long and important history involving the Standing Rock Sioux Tribe and the United States. This history includes the signing of a peace treaty at Fort Laramie, Wyoming, in 1868. The treaty recognizes our right to self determination, and contains a solemn promise by the United States to assist our Nation to survive in a changing era.

Yet the federal policy has taken dramatic swings in the past 130 years. After the treaty period of the 1850's and 1860's, the federal government undertook to assimilate Indians. Our Tribal lands were allotted and confiscated, our children were forcibly taken away from the Reservation and sent to Christian boarding schools, and we were prohibited from speaking our language.

This policy was universally discredited upon the publication of the Merriam Report in 1928. The Congress shifted policy against allotment and assimilation, with enactment of the Indian Reorganization Act of 1934. This act, accepted in part by Standing Rock, provided for Tribal self governance in the modern era.

But 20 years later, Congress shifted again. In 1953, the House of Representatives passed House Concurrent Resolution 108, expressing the "sense" "of the House" that all federal obligations to Indians be "terminated," "as rapidly as possible."

Let me emphasize to this Committee that the Termination Era in Indian Affairs has been universally discredited as a federal policy. This is important, because of the dramatic resemblance of S. 1691 to the Congressional language in HCR 108, the House of Representatives Termination Resolution of 1953.

Because of the failure of the termination policy, Congress shifted Indian policy again, and in 1973 the Congress formally entered the self determination era which we are now in, with enactment of the Indian Self Determination and Education Assistance Act (P.L. 93-638). Let there be no question, Mr. Chairman, that it is under this policy of the last 25 years that we have made the most remarkable economic and social progress in the history of the Standing Rock Nation.

We have developed or contacted dozens of federal programs for the economic, educational and social enhancement of our Tribal members. We have chartered the Sitting Bull College, in Fort Yates, North Dakota. We have developed a Tribal Farm Enterprise and two Class III Gaming establishments, which generate revenues with which we have built eight community centers, in rural, low income communities on our Reservation. We have developed a modern, technically adept Tribal Environmental Protection Program, to protect our Reservation environment. We have closed down all Reservation dump sites, and now ensure that solid waste is disposed of at a regional, off-reservation sanitary landfill. We developed the first Tribally-chartered Historic

Preservation Act of 1966, as amended in 1992. We have established a Tribal FM radio station, which advances our language and culture, and further opens our Tribal government affairs to our members.

The Standing Rock Sioux Tribe is proof that the self determination era is working. **There is no reason for Congress to turn back the clock and effect another dramatic shift in federal Indian policy.** There is nothing in the record before Congress to justify this. In fact, to the contrary, everything in the record suggests that we should hold the line, while increasing federal financial assistance to enable the Tribe to address our lingering economic development and social services needs.

Let there be no mistake. S. 1691 constitutes a return to Termination-era federal policies. Notwithstanding any statements by its sponsors that they support tribal government, **this bill is designed to destroy Tribal government.**

With one stroke of the pen, S. 1691 would take away our fundamental sovereign right to determine the circumstances in which our immunity from suit would be waived. The broad language in this bill would subject my Tribe to a broad array of personal injury, tax, contract and other liabilities over which we now have some measure of control.

The bill's sponsors would lead one to believe that the fact that Tribal governments currently have some control over the boundaries of liabilities that we potentially face, inevitably leads to arbitrary and unfair consequences. Nothing is further from the truth. Our Tribal government carries general liability insurance for personal injury matters. We have waived our immunity in contractual relationships. Mr. Chairman, there is no issue here. There is no reason for Congress to take any action in this regard.

As sovereign governments, we have our own court systems. Section 1(a)(1) purports that "a universal principle of simple justice and accountable government requires that all persons be afforded legal remedies for violations of their legal rights." This amorphous and seemingly benign language sounds much like the Terminationist language that destroyed Tribal governments in the 1950's and transferred jurisdiction over Indians to the states.

Nevertheless, it makes more sense to delineate the responsibility of jurisdiction over non-Indians and deeded lands within Reservations to Tribal Courts. If the Congress seeks "Indian legal reform," to provided non-Indians legal remedy it must be acknowledged that the court system of our sovereign nation does provide such a remedy. Congress would better effect the objective of supplying legal remedies to non-Indians in Indian Country by fully funding the Tribal Court Impovement Act of 1994. This would undoubtedly improve the "legal remedy" sought for non-Indians, and do so within existing law.

As I stated above, the language contained in S. 1691 eerily resembles the language contained in the termination-era legislation. S. 1691 is entitled "the American Indian Equal Justice Act." HCR 108 of the 83rd Congress purported to "free" the Tribes from "all disabilities and limitations specially applicable to Indians." The results are the same - state court jurisdiction over Indians, and Tribal governments with dramatically decreased powers.

Moreover, as stated above, the Standing Rock Sioux Tribe is a treaty tribe. The 1868 Fort Laramie Treaty provides that "if bad men among the whites. . . shall commit any wrong upon the person or property of the Indians . . . the offender is to be arrested and

punished according to the laws of the United States Federal and Tribal jurisdiction remains a federal treaty obligation to our Tribe

Article II of the United States Constitution clearly recognized the federal role - a role which is inalterably undermined by S 1691 - in relations with "Indian Tribes." The U S Supreme Court has interpreted Article II

> . . .our existing constitution confers on congress the powers of war and peace, of making treaties and of regulating commerce foreign nations, and among the several states and *with the Indian tribes* These powers comprehend all that is required for the regulation of our intercourse with the Indians

Worcester v. Georgia, 31 U S (6 Pet) 515 ___ (emphasis original)

By terminating the federal legal remedy afforded to Indian Tribes, S 1691 may be unconstitutional.

Moreover,

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial The very term nation so generally applied to them, means "a people distinct from all others The constitution, by declaring treaties already made as well as those to be made, to be the supreme law of the land has adopted and sanctioned the previous treaties with the Indian nations and consequently admits their rank among those powers who are capable of making treaties The word "treaty" and 'nation are words of our own language. . . having each a definite and well understood meaning We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense

Additionally, Article 12 of the Fort Laramie Treaty of 1868 specifically states:

> No treaty for the census of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians unless executed and

> signed by at least three-fourths of all the adult male Indians, occupying or interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights. . .

Id.

The sponsor of S. 1691 lacks an understanding of our history, and attempts to re-write it. He seeks to reverse federal Indian policy and bring it back to its darkest period. He's minimizing the unique government to government relationship agreed upon by treaty, as one sovereign nation with another. As Indian Nations our inherent rights of sovereign immunity must be upheld. The Senate should reject his efforts. "Great nations, like great men, should keep their word." F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1957), Black, J., *dissenting*.

NOCO

ENERGY CORP.

TESTIMONY OF JAMES D. NEWMAN
EXECUTIVE VICE PRESIDENT
NOCO ENERGY CORP.
TO THE
SENATE INDIAN AFFAIRS COMMITTEE
WEDNESDAY, MARCH 11, 1998
WASHINGTON, D.C.

GOOD MORNING. I WOULD LIKE TO THANK CHAIRMAN CAMPBELL AND THE MEMBERS OF THE SENATE INDIAN AFFAIRS COMMITTEE FOR ALLOWING ME THE OPPORTUNITY TO TESTIFY TODAY.

NOCO

MY NAME IS JAMES D. NEWMAN AND I AM EXECUTIVE VICE PRESIDENT OF NOCO ENERGY CORP. BASED IN TONAWANDA, NEW YORK.

NOCO IS A 65-YEAR OLD, THIRD-GENERATION, FAMILY-OWNED BUSINESS THAT EMPLOYES APPROXIMATELY 700 PEOPLE THROUGHOUT BUFFALO AND NEW YORK STATE. ALMOST HALF OF OUR EMPLOYEES WORK IN OUR NOCO EXPRESS GASOLINE CONVENIENCE STORE CHAIN.

I ALSO APPEAR BEFORE YOU AS PRESIDENT OF THE INDEPENDENT PETROLEUM MARKETERS ASSOCIATION OF NEW YORK STATE, OR IPNY, AND AS A MEMBER OF THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA, OR SIGMA.

I AM HERE TODAY TO ASK THIS PRESTIGIOUS BODY TO IMPOSE WHAT THE STATES AND THE SUPREME COURT HAVE ALREADY DETERMINED TO BE A LEGAL RIGHT – THE RIGHT FOR THE STATES TO COLLECT SALES TAX ON NATIVE-AMERICAN RESERVATIONS FROM GOODS PURCHASED BY NON-NATIVE-AMERICANS.

I WANT TO BE PERFECTLY CLEAR THAT WE DO NOT IN ANY WAY SUPPORT ANY LEGISLATIVE EFFORT THAT WOULD REQUIRE NATIVE-AMERICAN BUSINESSES TO IMPOSE SALES, EXCISE OR USE TAXES ON NATIVE-AMERICANS.

BEFORE NEW YORK STATE RECENTLY REVISED ITS POSITION, PREVIOUS STATE REGULATIONS WERE VERY CLEAR THAT NATIVE-AMERICAN BUSINESSES HAD TO COLLECT TAXES ON GOODS SUCH AS GASOLINE THAT WERE PURCHSED ON RESERVATIONS BY NON-NATIVE AMERICANS.

THE REGULATIONS INSTRUCTED NATIVE-AMERICAN BUSINESSES TO COLLECT THE TAXES AND FORWARD THE COLLECTIONS TO THE STATE. NEW YORK WENT SO FAR AS TO NEGOTIATE DIRECTLY WITH THE TRIBES TO CREATE INDIVIDUAL TAX COMPACTS WHICH WOULD OUTLINE HOW

THIS PROCESS WOULD WORK AS EACH TRIBE HAS DIFFERENT RULES FOR SELF-GOVERNANCE.

WE STRONGLY BELIEVE THAT NEW YORK'S DECISION TO REPEAL THESE REGULATIONS AND THE SUBSEQUENT COMPACTS WAS EXTREMELY UNFAIR. WE HAVE ALWAYS VIEWED THIS ISSUE AS A MATTER OF FAIRNESS AND WE TURN TO YOU TO HELP US FIND A FAIR SOLUTION BY LENDING OUR STRONG SUPPORT TO SECTION 3 OF THE AMERICAN INDIAN EQUAL JUSTICE ACT.

ALLOWING THE STATES TO BRING ACTION IN FEDERAL DISTRICT COURT TO ENFORCE THE OBLIGATION NATIVE- AMERICAN TRIBES HAVE TO COLLECT AND REMIT STATE, EXCISE, USE AND SALES TAXES OWED FROM SALES MADE BY NATIVE-AMERICANS TO NON-NATIVE AMERICANS THROUGH SECTION 3 WOULD BE A FAIR AND EQUITABLE SOLUTION.

WE BELIEVE THAT THE PREMISE OF SECTION 3 WOULD INDEED OFFER THE MEMBERS OF ORGANIZATIONS SUCH AS IPNY AND SIGMA A LEVEL PLAYING FIELD WITH THE NATIVE-AMERICAN COMPETITORS.

LIKE NOCO, MANY OF THE IPNY AND SIGMA MEMBERS ARE FAMILY-OWNED AND OPERATED BUSINESSES. AND, FOR MANY OF US, WE REMAIN AT A SERIOUS COMPETITIVE DISADVANTAGE WITH NATIVE-AMERICANS BECAUSE OF THIS INEQUITY.

IN NEW YORK STATE, OUR NATIVE-AMERICAN COMPETITORS ARE SELLING GASOLINE AT TWENTY TO THIRTY CENTS BELOW THE PRICE OF A GALLON OF GASOLINE SOLD BY OFF-RESERVATION MARKETERS.

MR. CHAIRMAN, THIS WOULD BE ANALOGOUS TO THE NATIONAL FOOTBALL LEAGUE SAYING TO YOUR SUPER BOWL CHAMPION DENVER BRONCOS THAT THE TEAM MUST NOW GO THE FULL 100 YARDS TO SCORE, BUT YOUR OPPONENT ONLY HAS TO GO 70 OR 80 YARDS. THAT CERTAINLY IS UNFAIR.

BEFORE I MOVE ON, I BELIEVE THAT IT IS IMPORTANT TO CLEARLY STATE THAT NOCO ENERGY CORP., IPNY AND SIGMA ACKNOWLEDGE AND RESPECT THE SOVEREIGNTY STATUS OF NATIVE-AMERICAN NATIONS. ALL UNITED STATES CITIZENS SHOULD HONOR AND RESPECT OUR NATIVE-AMERICAN TREATIES.

IN THE NAME OF FAIRNESS THOUGH, WE HAD HOPED THAT OUR NATIVE-AMERICAN COMPETITORS WOULD RESPECT THE NEW YORK STATE REGULATIONS REQUIRING THE COLLECTION OF SALES TAX FROM NON-NATIVE AMERICANS.

MOST TRIBES IN NEW YORK STATE DO RESPECT NEW YORK'S PREVIOUS REGULATIONS AND WE RESPECT THEM FOR THEIR EARNEST AND SINCERE EFFORTS IN THE NEGOTIATIONS TO RESOLVE THIS DILEMMA THROUGH THE TAX COMPACTS.

UNFORTUNATELY, A FEW UNSCRUPULOUS NATIVE-AMERICAN BUSINESSMEN DISREGARDED AND RIDICULED THESE COMPACTS.

THE COMPACT REMEDY WAS EVENTUALLY MET WITH OUTRIGHT VIOLENCE AND ACTS OF SABOTAGE. NATIVE-AMERICANS AND NATIVE-AMERICAN SYMPATHIZERS BURNED TIRES, ULTIMATELY FORCING THE NEW YORK STATE THRUWAY TO CLOSE DUE TO POOR VISIBILITY THAT THREATENED THE GENERAL PUBLIC AND HALTED INTERSTATE COMMERCE. MEMBERS FROM THE NEW YORK STATE POLICE WERE PHYSICALLY ASSAULTED. THESE ACTS ALSO INJURED INNOCENT NATIVE-AMERICANS. ONE MOTORIST WAS EVENTUALLY KILLED.

OUR FEAR IS THAT A FEDERAL REMEDY WOULD STILL RESULT IN THESE KINDS OF PLANNED AND ORCHESTRATED ACTS OF VIOLENCE. THE LAST THING WE WANT IS A SITUATION IN WHICH LIVES ARE JEOPARDIZED.

WE BELIEVE THAT HOW TO ENFORCE A FAIR REMEDY IS JUST AS IMPORTANT AS DEFINING A FAIR REMEDY.

WE ARE ENCOURAGED BY SECTION 3 OF THE AMERICAN INDIAN EQUAL JUSTICE ACT AND WILL HELP TO SEEK ITS PASSAGE. WE HAD HOPED THAT TRIBES BASED IN NEW YORK AND THE STATE COULD HAVE REACHED CONSENSUS THROUGH INDIVIDUAL TAX COMPACTS, BUT THIS DOES NOT SEEM TO BE POSSIBLE.

WE BELIEVE THAT SECTION 3 WOULD HELP LEVEL THE PLAYING FIELD FOR BUSINESSES THAT COMPETE WITH NATIVE-AMERICAN BUSINESS ENTITIES, WHO CURRENTLY ENJOY UNFAIR COMPETITIVE ADVANTAGES IN THE MARKETPLACE.

WE URGENTLY TURN TO THIS RESPECTED BODY FOR YOUR HELP IN BRINGING A FAIR RESOLUTION TO THIS LONG STANDING DILEMMA.

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THIS PRESTIGIOUS BODY. I WILL ANSWER ANY QUESTIONS YOU MAY HAVE.

SANTA ANA PUEBLO
2 Dove Rd.
BERNALILLO, NEW MEXICO 87004

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Secretary

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TESTIMONY OF THE SANTA ANA PUEBLO
ON SENATE BILL 1691
105th CONGRESS, SECOND SESSION

I. INTRODUCTION

The Santa Ana Pueblo ("Pueblo") opposes Senate Bill 1691, the "American Indian Equal Justice Act" ("S.1691"). S.1691 would abrogate the sovereign immunity of Indian tribal governments for all tort claims and contract actions in derogation of existing, well-established federal and tribal law, and without regard for the authority of tribal courts. Contrary to existing law, S.1691 would subject tribal governments to lawsuits in state courts under state law for torts and contracts, it would abrogate tribal sovereign immunity for the collection of state taxes in federal court, and it would create a private cause of action under the Indian Civil Rights Act in federal court for unspecified damages and relief. This bill is an egregious breach of numerous sacred treaties and agreements, and would result in a marked abandonment of federal law and policy, and would make a mockery of the federal trust responsibility to Indian tribes. S.1691 is unnecessary, unwise and should not be passed.

II. BACKGROUND

The Santa Ana Pueblo is a federally recognized Indian tribe exercising a traditional form of government infused with some contemporary governmental elements. The present government combines the traditional tribal theocracy, the secular government decreed by Spain in 1620, and a modern administrative structure for maintenance of day-to-day operations. The Tribal Council

makes governmental policy decisions through actions embodied in resolutions and ordinances; the Governor and Lt. Governor handle external affairs; the administrative staff handles day-to-day operations; and the traditional religious councils and kivas handle internal affairs. The Tribal Council is comprised of all male heads of household, who serve for life, while officers are appointed to one-year terms. The Pueblo has an established traditional tribal court system, with the governor serving as chief judge as well as a contemporary court system with a law-trained judge.

The Pueblo land base consists of approximately 63,000 acres of land in Sandoval County, located in north-central New Mexico near the town of Bernalillo, about 18 miles north of Albuquerque. The Pueblo has about 660 members, many of whom live on the Santa Ana Reservation. The Pueblo owns a 27-hole championship golf course, a four-star restaurant, a garden center and a gaming facility which serve both domestic and foreign visitors. The Pueblo also has organized several tribal corporations and enterprises including Southern Sandoval Investments, Ltd., Santa Ana Golf Corporation, Santa Ana Hospitality Corporation and Santa Ana Non-Profit Enterprise.

III. EXISTING, APPLICABLE FEDERAL AND TRIBAL LAWS AND PRACTICES

The abrogation of tribal sovereign immunity contemplated by S.1691 for contract and tort actions in state court under state law is in derogation of the long-standing principles that Indians tribes retain "attributes of sovereignty over both their members and their territory," United States v. Mazurie, 419 U.S. 544, 557 (1975), and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states ... ." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980). S. 1691 severely breaches

these principles of federal law. The Pueblo is amply equipped to deal with tort and contract disputes that may arise on the Reservation.

In the contractual context, the Tribe has established tribal corporations that have the full authority to make contracts, provide for arbitration or other dispute resolution, and to waive immunity. Under limited waivers of immunity, the tribal corporation is authorized to pledge the assets of the corporation to satisfy any claims made against it. For example, the Pueblo has agreed to arbitration to resolve any disagreement arising under the Tribal-State gaming compact and agreed to waive sovereign immunity under a gaming equipment contract.

The Santa Ana Star Casino ("Star") maintains liability insurance insuring the Pueblo, its agents, and employees against claims for injury or damage from visitors. Any claim can be brought either in tribal court or state court, given that the Pueblo agreed to extend concurrent jurisdiction to the state for a visitor's claim of liability for bodily injury or property damage. Visitors, guests, and vendors to the Santa Ana Star are afforded ample protection in pursuing claims through tribal or state court and seeking recovery under the Star's outside insurance policy coverage.

The Pueblo's main industry is tourism, due to our proximity to Santa Fe and our location north of Albuquerque. The Pueblo transacts substantial business with visitors, both domestic and foreign. The Santa Ana Golf Course is the home of the PGA/NIKE New Mexico Charity Classic Tournament and was rated as one of American's best golf courses in 1995 by *Golf Week* magazine. It hosts many annual tournaments, including the PGA Challenge Cup and U.S. Open Qualifier. The contracts that the Tribe and its corporations have negotiated and entered into

include arbitration and other dispute resolution mechanisms that have served all parties well, based on the fact that there have been no major, unresolved problems or disputes.

With respect to tort claims made against the Pueblo, the Pueblo and its corporations carry and maintain insurance coverage for governmental and business activities. Equally important, the Tribe does not allow their insurance companies to raise the defense of tribal sovereign immunity to avoid paying claims. This is very important to the Pueblo because we seek to protect both tribal members and non-members who may be injured in the course of dealing with the Pueblo or its corporation.

In addition, the Pueblo maintains a tribal court system with jurisdiction over all cases and controversies that arise within the jurisdiction of the Tribe. Therefore, any contractual or tort disputes that cannot be resolved through arbitration or insurance settlement can be heard in the Tribal Court. Given the protection afforded tribal members, non-members, and visitors, there is no need for congressional intervention to abrogate tribal sovereign immunity for actions that may be brought against the Pueblo or its businesses.

IV. STATE TAXATION

Similarly, there is no need for congressional abrogation of tribal sovereign immunity for actions against Indian tribal governments for the collection of state taxes. Under long-standing principles, Indian tribes and reservation Indians are subject to tribal and federal law, and therefore, Indian tribes are generally exempt from state taxation and regulation in Indian country. See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). The Supreme Court has stated that:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I. § 8, cl. 3. ... As a corollary to this authority,

> and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Id. at 764. Furthermore, the Supreme Court has ruled that when Indian tribes and individual Indians generate value through economic activities on their reservations, federal law may also preempt state taxation of non-Indians engaged in Indian commerce. For example in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Supreme Court held that non-Indian hunters using a tribal hunting license on reservations lands were exempt from state hunting regulations reasoning that:

> The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. ... The Tribal enterprise ... clearly involves "value generated on the reservations by activities involving the Tribe."

Id. at 340.

By contrast, the Supreme Court has ruled that where Indian tribes or individual tribal retailers sell prepackaged goods to non-Indians, without adding reservation value, the non-Indian consumer may be liable to pay non-discriminatory state taxes whose legal incidence falls on the transaction by the non-member. See Washington v. Colville, 447 U.S. 134 (1980) (prepackaged cigarettes). Though a state's authority to tax in these circumstances does not diminish the Indian tribe's inherent authority to tax the same transaction, it has given rise to the problem of "dual taxation" in Indian country.

To address the dual taxation burdens on commerce and to facilitate tax collection, the Supreme Court has recognized that states and Indian tribes may enter into "mutually satisfactory" tax agreements. See Oklahoma Tax Comm'n v. Citizens Band Potawatomi, 485 U.S. 505, 514

(1991). S.1691 would interfere and destroy the cooperation of states and tribes to enter into mutually satisfactory agreements, and in cases where the legal incidence of a particular state tax law does not fall on the ultimate consumer, as in New Mexico, S.1691 permits a state to sue for taxes that it would not otherwise be entitled to receive. Furthermore, the broad language contained in S.1691 would effectively destroy a tribe's ability to develop and generate value through on-reservation economic activities free of state taxation. S.1691 sets a dangerous precedent to abrogate tribal sovereign immunity in a manner that obstructs tribal-state cooperative agreements and impedes on-reservation economic development and taxation.

V. INDIAN CIVIL RIGHTS ACT

Under prevailing law, the Indian Civil Rights Act does not provide a waiver of tribal sovereign immunity, but it makes available to any person the right of a writ of habeas corpus in federal court to test the legality of his detention by order of an Indian tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Tribal courts have construed the Indian Civil Rights Act in accordance with federal law. In amending the Indian Civil Rights Act, S.1691 would abrogate tribal sovereign immunity in an extremely broad manner without consultation from the Indian tribes. Any legislation amending the Indian Civil Rights Acts must be accomplished in a manner that preserves tribal governmental solvency, authority and functions in accordance with and respect for tribal laws, customs and institutions.

VI. CONCLUSION

The Santa Ana Pueblo opposes S.1691 because it would abrogate tribal sovereign immunity for tort claims and contract actions in derogation of federal law and policies of promoting tribal self-determination and self-sufficiency. S.1691 disregards existing, well-

established federal and tribal law, as well as tribal courts. S.1691 would set a dangerous precedent by exposing tribal government treasuries to private actions in state court, and by subjecting tribal governments to actions for the collection of state taxes that a state might otherwise be barred from collecting. S.1691 is reckless in its abrogation of tribal sovereign immunity for claims under the Indian Civil Rights Act. Simple logic dictates that such a departure from well-established law requires more thought and analysis on the effects this broad-sweeping abrogation of tribal sovereignty will have on Indian Nations. In accordance with the federal policies of self-determination and self-sufficiency, Congress should pass legislation that builds the necessary tribal infrastructure for tribal courts, business activities, taxation and economic development. Because S.1691 jeopardizes tribal governmental solvency, diminishes tribal authority, undercuts the inherent authority of tribal courts, and disregards well-established federal and tribal laws and policies, the Santa Ana Pueblo urges that S.1691 not be passed. Be assured, however, that the Pueblo will work with congress for positive legislation that will better address the concerns raised in S.1691.

STATEMENT OF THE HOPI TRIBE PROVIDED BY THE HOPI TRIBAL COUNCIL AND CHAIRMAN, WAYNE TAYLOR, JR., REGARDING S.1691

TRIBAL GOVERNMENT AND SOVEREIGN IMMUNITY

The Hopi Tribe welcomes this opportunity to express its views concerning Senate Bill 1691.

Indian tribal governments, like the United States and the State governments, possess Sovereign Immunity from unconsented lawsuits.

The idea of such an immunity is as fundamental as the idea of government itself. In helping to lay down the foundations of Constitutional government in this Country, Alexander Hamilton in 1788 in his Federalist Paper No. 81 reassured the several States of their continued immunity from unconsented lawsuits in the following words:

> **"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . This is one of the attributes of Sovereignty . . ."**

Hamilton's argument was aimed at putting to rest the fears of the several states who worried that their treasuries would be laid open to ruin by the lawsuits of individuals or other states. Protection against this fear was provided by the concept of Sovereign Immunity and later by the 11th Amendment to the Constitution.

This early fear of the states, underscores the primary rationale behind the existence of Sovereign Immunity, ie., the protection of the public treasury from lawsuit, except as consented to by the sovereign who must act for the benefit of the

entire nation, state or tribe, and not exclusively for the individual litigant. The obligation of the government to its citizens cannot be fulfilled if the public treasury is depleted by lawsuits.

Just as important, the immunity allows the processes of government to proceed without fear that every governmental action will result in a lawsuit designed to test its efficacy or merely intimidate the lawmakers and administrators in carrying out their work. Government resources should not be expended defending against frivolous or otherwise ill-intended lawsuits.

An important part of Sovereign Immunity is the notion of consent, ie. that no lawsuit may be maintained against the government, in other words the people and their treasury, without the consent of the government acting in the best interest of the people.

The expression of consent is at the heart of the American system of government. This nation was formed by the united consent of the American people as they acted to adopt the Constitution. Consent is the connection between Sovereignty and Immunity. The idea of consent means that it is the right of every government; federal, state, and tribal to choose the circumstances which will give rise to governmental liability and the scope of that liability before the courts.

The legislation proposed by Senator Gorton would take away that right of consent from the Indian nations of this great country. To do so would be to act contrary to the expressed policy of the United States to promote and preserve tribal self-government, the very heart and soul of Federal Indian Policy. Indeed, the policy

of self-government or self-determination is at the heart of American democracy both at home and abroad. At home, self-determination is the principle upon which this nation was founded and built and to which the nations of the world now look to for hope. We too as Indian nations have long embraced these principles. Moreover, America has always sought to promote these same principles abroad and around the world. The Indian people of this country were with you in every fight to do so, standing shoulder-to-shoulder from the American Revolution to Desert Storm and every shore in between. Are we now to be judged by the Senate to be less deserving of the protections of these principles of freedom and self-determination that we have throughout history loyally and without reserve supported you in the fight to protect? No, we are not!

We have earned these protections and blessings as members of humankind and through our sacrifices and our losses. Indian people will never forget that it was our land that made it possible for this Nation of America to take root and grow to greatness. When we agreed, or in most cases were forced to give up a part of our lands, we did so based on an understanding that our agreement would not result in our destruction nor our loss of freedom. Like the English Philosopher, Edmund Burke, we too believed that freedom is ". . . the only advantage worth living for."[1] All that we asked for ourselves in return was a small place in this Great Nation where we could determine our destiny, where we could, guided by our hearts, be what we

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[1] Edmund Burke, speech to the British House of Commons, April, 1775.

choose to be--Indian people who have never and will never give up our identity and our shared love, with you, of freedom.

This Congress cannot and must not destroy this right of self-determination--this right that we have always possessed and which we have repeatedly won throughout the history of this nation with our lives, our land and our sacrifice.

Waiving the Immunity of Indian tribal governments opens the door to unfettered legal warfare on the tribes. Such warfare will lead first to the destruction of tribal property and ultimately to the destruction of tribal government itself. Such a result would be counter to longstanding Federal Indian Policy and destructive to the principles of freedom and self-determination which are the foundation of that policy and of America itself.

In the past Senator Gorton has sought to make tribal receipt of federal priority funding allocations contingent on waivers of tribal immunity. In asking the Indian Nations to waive our Sovereign Immunity in order to receive the same federal financial assistance that state and local governments receive without such waivers, you in effect are asking us to choose between the health and well-being of our children and our freedom. Is this the price of our place in America? If this unholy choice must be made, then we will choose freedom and place our health and well-being into the hands of God. For their can be no true well-being among any people without freedom. This is the lesson taught to us by our forefathers, both yours and mine. This is the lesson that we will teach our children. There is no life without freedom. To choose Senator Gorton's way is to choose death for American Indian Nations.

In addition to matters of principle and policy, there are very practical reasons which also support this conclusion. In the matter of commercial contracting, an undertaking where both parties to an arms length transaction are presumed to act in their respective best interest and with the advice of counsel as necessary, the tribes have come to expect that it is in the tribe's best interest to contract for appropriate dispute resolution provisions. Almost always this requires a limited waiver of tribal immunity. Typically, the waiver may include the ability to obtain specific performance of the contractual obligation or damages up to the value of the contract. The Hopi Tribe has come to expect that such limited waivers of the Tribe's immunity will be included in commercial contracts as a matter of business as usual. We understand that contracts are agreements of mutual accommodation and that if the Tribe wishes to undertake commercial transactions in advancing tribal interest, then it must do so with an eye toward accommodating the interest of the other party to the transaction by agreeing to limited waivers of immunity. This result is brought about by the reality of the market place and by the conscious choosing of the Tribe to be a part of that market place.

In cases involving personal injury to individuals resulting from the actions of the Tribe, insurance is the typical means of providing relief to the interested party. The Hopi Tribe, as a part of its Risk Management Policy requires liability and property damage insurance covering the activities of the Tribe and its officials and employees. These insurance policies require a minimum of $1 Million Dollars of liability coverage for each injury and for each person so injured. Property damage is covered up to

$500,000. Tribal departments and programs which receive federal funds are also covered by the Federal Tort Claims Act for injuries occurring to third parties in the course of tribal activities. The Tribe has maintained these insurance policies for many years and I am not aware of one instance where the Tribe has raised the defense of Sovereign Immunity as to personal injuries. In fact, I am aware of several instances where individuals have filed claims arising out of personal injuries and have been compensated from the Tribe's policies. We believe it to be in the best interest of the Tribe to maintain these insurance policies. We choose to act responsibly in pursuing our governmental activities.

In the area of tribal legislation, the Hopi Tribe continually enacts provisions providing for limited waivers of the Tribe's immunity and providing for judicial review of tribal decision-making which affects the property or other interest of both tribal members and non-Indians. We believe such a practice is in the best interest of the Tribe.

In each of these instances the Tribe is in the best position to determine when and to what extent a waiver of immunity will be made. This is the responsibility of tribal government, a responsibility which we have never turned from.

On the matter of waiving Tribal Immunity to allow State lawsuits against Tribes for the collection of taxes, let me suggest that we first undertake a dialogue concerning the fundamental unfairness of state taxation of transactions occurring within Indian Country. The Hopi Tribe has experienced this unfairness firsthand.

Most of the revenues of the Hopi Tribe are derived from the operation of two

coal mines within the reservation which are owned jointly by the Hopi and Navajo Nations. The coal is mined by Peabody Western Coal Company under lease agreements with the Hopi and Navajo. The State of Arizona taxes Peabody's operations and receives in excess of $15 million dollars per year in tax revenues. These tax revenues far exceed the amount of royalty income received by the Hopi Tribe from those same operations by Peabody Coal Company. Is there any fairness in such a situation where the State receives more from Indian owned natural resources than do the Indian owners of the resources themselves? Not only is this fundamentally unfair, it also lessens the value of the Tribe's coal by increasing the ultimate sales price and it weakens the tribal economy by taking much needed dollars from the reservation economic base, dollars which could be paid to the Tribe in the form of increased royalties or other benefits.

We are not aware of any overtures from the State rushing to resolve this inequity. We do not support measures which would give the States an even greater opportunity to tap into tribal economies and weaken those economies at the expense of tribal members.

Sovereign Immunity is not about denying plaintiffs access to the Tribal, Federal or State courts. Sovereign Immunity is about the right of Indian Tribes, just like the Federal and State governments, to decide when and under what circumstances and to what extent that immunity will be waived and litigants allowed to proceed to prove their claims for money damages or other appropriate relief. Tribal governments, like the state and federal governments, are in the best position to protect the interest of

their citizens in the tribal treasury and in the effective administration of government. Moreover, Tribal governments, like the State and Federal governments, are in the best position to balance those interest against the competing interest of litigants who allege some grievance against the Tribe. This is not unfair advantage, this does not intrude on notions of due process, this is simply a necessary protection for economically disadvantaged Tribal governments struggling to provide basic yet essential governmental services to their people.

Much has been made of the fact that the States and the Federal government have in many instances enacted laws limiting the assertion of Federal and State Sovereign Immunity. This is certainly true. However, as I have already pointed out, the Hopi Tribe has repeatedly acted, and I am sure many other Tribes have taken similar measures to provide for relief against the Tribe, in the areas of personal injury claims and contracts as well as general tribal legislation. What is overlooked by those who hold up Federal and State waivers of immunity in contrast to tribal waivers of immunity is the fact that the Federal and State governments with their huge tax bases are in a much better position to grant broad waivers of immunity than are the Tribes which have historically been hamstrung by the lack of a tribal tax base, partly as a result of the dual taxation problem engendered by state taxation of transactions within Indian country, and partly as a result of struggling tribal economies which are only now beginning to see the light of day. Waiving tribal sovereign immunity will only weaken these emerging economies. The resources that would normally be spent on governmental services and expanding economies would under the proposed

legislation be required to be diverted to the hiring of lawyers and the defense of lawsuits.

The Hopi Tribe joins with the other Indian Nations of this country in imploring the Senate to stand firm in support of the principles of freedom and self-determination for all American people including the Indian Nations of this Country. We beseech you to not turn away from your commitments to America's Indian People, commitments which span the distance between the birth of this nation and the present. No good thing can come from this proposed legislation. We urge its sound defeat.

AGREEMENT BETWEEN THE STATE OF MINNESOTA AND THE MILLE LACS BAND OF OJIBWE INDIANS

This Agreement is between the State of Minnesota ("State") and the Mille Lacs Band of Ojibwe Indians ("Band"), a federally recognized Indian tribe with jurisdiction over its members and its territory. The State Commissioner of Revenue ("State Commissioner"), exercising authority granted pursuant to Minnesota Statutes section 270.60, and the Band Commissioner of Finance ("Band Commissioner"), exercising authority pursuant to 4 Mille Lacs Band Statutes Annotated section 3(b) and Band Assembly Resolution No. 07-04-123-97, a copy of which is appended hereto, hereby agree to the following:

Section 1. Statement of Intent.

A. The Band and the State each assert sovereign authority to tax certain activities on lands within the jurisdiction of the Band. The parties recognize that, absent clear authority from Congress, the State does not have the authority to impose the taxes covered by this Agreement on the activities of the Band, Band agencies and instrumentalities, and Band members on such lands. However, there are many unsettled questions regarding Band and State taxation of the activities of non-Band entities and persons on such lands. The parties recognize that they each may have authority to tax such activities, and that the full assertion of such authority could result in tax rates on such activities that exceed the tax rates on similar activities occurring within the State but outside the jurisdiction of the Band. Similarly, the parties recognize that State sales taxes imposed on purchases by Band members on lands outside the jurisdiction of the Band and Band use taxes imposed on such purchases could also result in tax rates that exceed those on similar purchases by

others.

B. The purpose of this Agreement is to provide for the mutual recognition of and respect for the sovereignty of the State and the Band, to avoid disputes over taxation of activities on lands within the jurisdiction of the Band, and to ensure that the rate of taxation, for those taxes covered by this Agreement, does not exceed the rate on similar activities occurring on lands within the State but outside the jurisdiction of the Band. To achieve these objectives, the Band and the State shall, as hereinafter set forth:

1. establish a mechanism to allow the Band and Band-owned entities to exercise their exemption from those taxes specified in Section 7 of this Agreement, or provide for a refund of such taxes to the Band;
2. establish a mechanism for refunding to the Band tax payments made to the State by resident Indians who are not subject to the State's taxing authority; and
3. establish a mechanism for collecting and sharing taxes covered by this Agreement that are owed or paid by non-tribal members resulting from activities on lands within the jurisdiction of the Band.

C. This Agreement is the product of negotiation and compromise. Upon termination of this Agreement nothing herein shall be used to prejudice the position of either party regarding the lawful authority of the Band or the State to tax activities on lands within the jurisdiction of the Band or any other dispute between the parties.

Section 2. No Effect on Reservation Boundaries.

The Band and the State have different positions regarding the current boundaries of the Mille Lacs Indian Reservation ("Reservation"), but have found it unnecessary to resolve those

differences in order to enter into this Agreement. Accordingly, nothing herein shall be used to prejudice the position of either party regarding the boundaries of the Reservation, and any such use of this Agreement by any person or entity is unauthorized and improper.

Section 3. Definition of "Trust Lands".

As used in this Agreement, the term "Trust Lands" shall mean lands now or hereafter held in trust by the United States for the benefit of the Band or its members or for the benefit of the Minnesota Chippewa Tribe and administered by the Band. The parties agree that all Trust Lands are within or part of a "federally recognized Indian reservation" as that phrase is used in Minnesota Statutes section 270.60.

Section 4. Taxes Included in the Agreement.

A. Revenue Sharing.

The following taxes are subject to the revenue sharing provisions of this Agreement:

1. Sales and use taxes of the type described in Minnesota Statutes ch. 297A and incorporated into Band statutes.
2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes ch. 297F and incorporated into Band statutes.
3. Liquor taxes of the type described in Minnesota Statutes ch. 297G and incorporated into Band statutes.
4. Motor fuel taxes of the type described in Minnesota Statutes ch. 296 and incorporated into Band statutes.

B. Per Capita Refunds.

The following taxes are subject to the per capita refund provisions of this Agreement:

1. Sales and use taxes of the type described in Minnesota Statutes ch. 297A and incorporated into Band statutes.

2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes ch. 297F and incorporated into Band statutes.

3. Liquor taxes of the type described in Minnesota Statutes ch. 297G and incorporated into Band statutes.

4. Motor fuel taxes of the type described in Minnesota Statutes ch. 296 and incorporated into Band statutes.

C. No Tax on Gaming. Nothing in this Agreement is intended to authorize the State to impose any tax on the operation or proceeds of Band-operated gaming.

D. Other Taxes.

1. Nothing in this Agreement is meant to preclude the Band from imposing other taxes within Band jurisdiction.

2. Nothing in this Agreement is meant to preclude the State from imposing other taxes within State jurisdiction.

Section 5. Sharing Agreements.

A. Determining the Tax Base That Will Be Shared.

1. The sales tax base that will be shared ("sales tax base") is computed by:

a. adding the amount of sales and use taxes collected by vendors on Trust Lands, and

b. subtracting the amount of the per capita sales tax refund computed pursuant to this Agreement.

2. The use tax base that will be shared ("use tax base") is equal to the use tax imposed by the Band on items purchased off the Reservation by the resident Indian population on or adjacent to the Reservation, and shall be calculated by multiplying the annual "per capita use tax" times the "total resident Indian population on or adjacent to the Reservation". The initial annual "per capita use tax" shall be $131.70 (one hundred thirty one dollars and seventy cents), but this amount shall be adjusted as provided in Section 6, Paragraph B, below. The "total resident Indian population on or adjacent to the Reservation" shall be determined in accordance with Section 6, Paragraph D, below.

3. The motor fuels tax base that will be shared ("motor fuels tax base") is computed by:

   a. adding the motor fuels taxes paid on fuel sold at retail on Trust Lands, and

   b. subtracting the total amount of the motor fuels tax per capita refund computed pursuant to this Agreement, and

   c. subtracting the motor fuels tax refund paid on purchases made by the Band or Band-owned entities pursuant to this Agreement.

4. The cigarette and tobacco products tax base and the liquor tax base that will be shared ("cigarette and tobacco products tax base" and "liquor tax base") are computed by:

   a. adding the tax paid on cigarettes and tobacco products and liquor sold at retail on Trust Lands, and

b. subtracting the total amount of the cigarette and tobacco products and the liquor tax per capita refunds computed pursuant to this Agreement.

B. Sharing the Tax Base.

1. The State and the Band will share the sales tax base, the use tax base, the cigarette and tobacco products tax base, the liquor tax base, and the motor fuels tax base in each case where the calculation of the tax base yields a positive number. In each such case, the State will receive 50% of the tax base and the Band will receive 50% of the tax base. The mechanism for sharing the use tax base is set forth in Section 6, Paragraph F, below. The mechanisms for sharing the sales tax base, the cigarette and tobacco products tax base, the liquor tax base, and the motor fuels tax base are set forth in Section 8, Paragraph B, below.

2. For the years 1997 through 2001, the State shall pay to the Band an additional amount from the State's share of taxes collected under this Agreement, to be determined and paid as follows:

a. The amount payable for 1997 is $120,000.

b. Except as provided in paragraph c below, the amount payable for future years shall equal the amount payable for the prior year plus a percentage of that amount, which percentage shall be calculated as follows:

(i) determine the percentage increases in the total tax revenues collected pursuant to this Agreement or the prior tax agreement between the State and the Band on Trust Lands in the immediately preceding year compared to the year before that for

each of the four categories of taxes subject to this Agreement: cigarette and tobacco products excise taxes; liquor excise taxes; motor fuels excise taxes; and sales and use taxes, provided that the total tax revenues collected on Trust Lands in 1996 for each category of taxes (except cigarette and tobacco products excise taxes, for which data for the entire year is available) shall be determined by multiplying the taxes collected from April 1, 1996, through December 31, 1996, times 1.33, and provided further that, for purposes of this calculation, tax revenues collected on Trust Lands for each tax type in any year shall be presumed to be no less than the amount of the annual per capita refund payment for that tax type in that year;

(ii) add the four percentages determined under (i), and

(iii) divide by four, provided that the resulting percentage shall be at least 5% and shall not exceed 20%.

c. The total payment in any year under this section shall not exceed $200,000.

d. The annual amount due shall be paid in four equal payments by the last day of April, July, October, and January. The first payment shall be due on April 30, 1997.

Section 6. Per Capita Refunds.

A. The State shall annually pay, in four quarterly payments, an estimate of taxes paid on

the Reservation by the resident Indian population on or adjacent to the Reservation.

1. The initial annual refund for sales tax shall be $43.90 (forty-three dollars and ninety cents) per resident Indian.

2. The initial annual refund for motor fuels taxes shall be $37.55 (thirty seven dollars and fifty-five cents) per resident Indian.

3. The initial annual refund for cigarette and tobacco products taxes shall be $37.55 (thirty-seven dollars and fifty-five cents) per resident Indian.

4. The initial annual refund for liquor taxes shall be $10.31 (ten dollars and thirty one cents) per resident Indian.

B. The initial annual per capita refunds specified in Paragraphs A.1 through A.4 of this Section and the initial annual per capita use tax specified in Section 5, Paragraph A.2, above, will be recalculated by the State in September 1997 and each September thereafter, and will be adjusted to reflect changes in the Consumer Price Index for the Minneapolis/St. Paul area for the previous state fiscal year. The changes in the Consumer Price Index will be measured using figures from the United States Bureau of Labor Statistics. The recalculated amounts will form the basis for refunds and use tax sharing payments payable in October and all future refunds and use tax sharing payments until the next recalculation. If there has been a material change in the state tax base or a material change in state tax rates, the State will adjust the per capita refund or use tax sharing payment to reflect those changes, and shall promptly notify the Band of the adjustment.

C. The quarterly refunds required in this Section shall be determined by:

1. multiplying the following numbers:

   a. the amount per resident Indian as determined under Paragraphs A.1 - A.4 and B of this Section, and

   b. the "total resident Indian population on or adjacent to the Reservation"; and

2. dividing the result by four.

D. The "total resident Indian population on or adjacent to the Reservation" at the commencement of this Agreement shall be the population certified by the Band in 1996 under the prior tax sharing agreement between the State and the Band. The Band shall hereafter certify to the State on or before July 1 of each year the total resident Indian population on or adjacent to the Reservation by providing a copy of the latest Report on Service Population and Labor Force of the United States Department of the Interior, Bureau of Indian Affairs, for the Reservation. If no new report has been prepared and approved in the previous year, the Band shall so inform the State, and the latest report submitted to the State shall be utilized to certify the total resident Indian population until a new report is prepared and approved. The population number certified by each July 1 shall be used to calculate per capita refunds and use tax sharing payments beginning with the refunds and payments payable in the following October.

E. The State will not pay any refunds or payments required in this Agreement if the Band has not submitted the latest population report or informed the State that no new report has been prepared and approved by July 1 of any year; provided that if the Band submits the latest report or informs the State that no new report has been prepared and

approved within one year of the date it is due, the State shall pay all refunds and payments withheld by it up until the date of submission.

F. The State will pay the quarterly cigarette and tobacco tax, liquor tax and motor fuels tax refunds required in this Section 6 and the use tax sharing payment required in Section 5 by the last day of October, January, April, and July, unless otherwise specified in this Agreement. The State will pay refunds and use tax sharing payments by warrant payable to the Band. If the State fails to pay refunds or use tax sharing payments by such dates, and such failure is not authorized in this Agreement, the Band may withhold the estimated amount of the late payment from any taxes collected by the Band or Band-owned entities and due to be remitted to the State under this Agreement.

G. The Band shall keep an amount equivalent to one-third of the amount of the quarterly sales tax refund required in this Section 6 from the sales tax collected by the Band or Band-owned entities each month pursuant to this Agreement.

Section 7. Exemptions from Tax.

A. No sales or use tax shall be assessed on purchases made within or outside the Reservation by the Band or a Band-owned entity for goods or services used by the Band or such entity solely for its own use and not intended for resale. To exercise this exemption, the Band or Band-owned entity shall present a State exemption certificate to the vendor at the time of purchase.

B. No sales or use tax shall be assessed on purchases of materials within or outside the Reservation by Indian or non-Indian purchasers for use in construction projects on Trust Lands when the Band or a Band-owned entity is a party to the construction

contract, and the construction contract is being undertaken for the purpose of the Band's welfare. To exercise this exemption, the purchaser shall present a state exemption certificate to the vendor at the time of purchase.

C. No motor vehicle excise taxes shall be assessed on vehicles purchased within or outside the Reservation by the Band or a Band-owned entity for its own use and not intended for resale. To exercise this exemption, the purchaser shall present a copy of an exemption certificate from the State.

D. Motor fuels taxes paid on purchases made by the Band or a Band-owned entity for fuel used by the Band or such entity in vehicles owned by them will be refunded to the Band on a quarterly basis. The Band will file a quarterly claim for refund on forms supplied by the State within 45 days of the end of the calendar quarter. The Band may file a claim or supplement a previously filed claim thereafter, provided, no claim will be paid by the State under this section if it is filed more than one year late. The claim shall include a Band-prepared summary of supplier invoices evidencing the number of gallons purchased by the Band or Band-owned entity. The Band shall keep the actual supplier invoices for a minimum of three and one-half (3 1/2) years. The claim shall also contain a declaration that the fuel was used by the Band or Band-owned entity in the performance of official Band business. The State will pay the refund within 30 days of the submission of the claim by a warrant made payable to the Band.

Section 8. Administration of the Agreement.

A. Band Implementation.

1. The Band agrees, subject to the provisions of this Agreement, that the taxes provided for under this Agreement, and all subsequent amendments thereto, or Band taxes identical to them, shall be imposed on and collected from: (a) the resident Indian population on or adjacent to the Reservation; and (b) other persons or entities who engage in taxable activities on Trust Lands. Such taxes shall be collected and remitted in the same manner as required under appropriate Minnesota statutes and this Agreement.

1A. Notwithstanding any other provision of this Agreement, no tax shall be imposed or collected for sales and use taxes imposed by chapter 297A on telephone services, electricity, natural gas, heating oil, and LP gas delivered to Band members on Trust Lands.

a. The Band shall be primarily responsible for administering this provision by notifying service providers of the name, address and other information necessary to identify the Band members entitled to the exemption. The notice must include a declaration that the person entitled to exemption is a member of the Band and that the service is being provided for use on Trust Land.

b. The Band shall retain a copy of the notices sent to the providers. Upon request of the State Commissioner, the Band shall provide reasonable assistance necessary to assure that this exemption is properly used only by Band members qualified for exemption.

c. Notwithstanding the effective date of this Agreement, or any other

provision of the Agreement, the implementation of this exemption shall not result in any refunds or credits for taxes paid by Band members for services provided prior to the service provider receiving notice of eligibility for exemption from the Band.

2. The Band will cause to be adopted and will enforce such Band laws as are necessary to implement the requirements of this Agreement, including the right of the State to audit and to assess and collect the taxes due under this Agreement; provided that any audits of the Band or a Band-owned entity are carried out pursuant to Paragraph C.2 of this Section.

3. All taxes covered by this Agreement shall be collected by the State in accordance with this Agreement.

4. Upon request of the State or the Band, the other party will assist in the assessment and collection of any tax owed pursuant to this Agreement.

5. All sellers of cigarettes, tobacco products, motor fuels or liquor within the Reservation will purchase their stock from distributors licensed by the State of Minnesota, who will collect all applicable taxes as if the sale occurred outside the Reservation to a non-Indian vendor. Any provision in any Minnesota tax law that allows Reservation Indians to make purchases exempt from any state tax subject to this Agreement may not be exercised while this Agreement remains in force.

6. The Band or a Band-owned or -licensed entity shall not sell cigarettes or tobacco products to any retailer or licensed subjobber. All cigarettes sold within

the Reservation shall contain an Indian Reservation cigarette stamp as described in Minnesota Statutes section 297F.08, Subd. 4. Such cigarettes may be sold only within the Reservation.

7. The Band shall make reasonable efforts to provide a list to the State of all vendors who make taxable sales on Trust Lands, including vendors who sell cigarette and tobacco products, liquor and/or motel fuels. The State shall provide reasonable assistance to insure completeness of the list. The list should include the legal business name, the address, and the Minnesota Business Identification Number, if applicable, of each vendor, and the type of tax involved for each vendor. The Band and the State agree to update these lists and the information contained in them as changes occur.

B. Tax Sharing Payments to the Band.

1. The Band shall file a separate claim for payment of its share of the cigarette and tobacco products tax base, the liquor tax base, and the motor fuels tax base pursuant to this Agreement. The claim must include copies of invoices or other proof of tax paid by the vendor.

2. The Band shall file one claim for tax sharing payments per quarter for each tax described in paragraph 1 above. The claim shall be filed by the 15th day of April, July, October and January for taxes paid in the preceding quarter. If the Band fails to file its claims by the appropriate date, the State will not be obligated to make tax sharing payments for the affected quarter; provided that if the Band makes the filing within one year after its due date, the State shall make

the payment within thirty days of the filing.

3. If the Band or a Band-owned vendor makes a sale on Trust Lands in any one day to a person of:

   a. 10 or more cartons of cigarettes, unless such sales are made to a Band member for ceremonial events,

   b. 100 or more gallons of motor fuel,

   c. 7 or more cases of beer,

   d. 3 or more cases of wine, or

   e. 3 or more cases of distilled spirits,

   then the vendor must prepare an invoice containing the following information: (i) name and address of purchaser; (ii) quantity sold; (iii) date of sale; and (iv) total sale price. Such invoices must be submitted to the State along with the claim required by Paragraph B.2 of this Section.

4. The State shall make tax sharing payments required by this section quarterly. Such tax sharing payments shall be made by the last day of April, July, October, and January. Payment shall be made by warrant made payable to the Band. If the State fails to make the tax sharing payments by such date, and such failure is not authorized by this Agreement, the Band may withhold the estimated amount of the late payment from any taxes collected by the Band or Band-owned entities and due to be remitted to the State under this Agreement.

5. Mechanism for sharing the sales tax base.

   a. By the 30th day of each month, the Band shall provide the State

Commissioner, on a form prescribed by the State Commissioner, a summary of: (i) the aggregate sales tax collected in the previous month from sales occurring on Trust Lands by the Band or Band-owned entities; (ii) the portion of the per capita sales tax refund retained by the Band for the previous month under Section 6, Paragraph G, above; and (iii) the difference between (i) and (ii).

b. The Band shall retain 50 percent of the difference reported under Paragraph B.5.a. A warrant made payable to the Minnesota Department of Revenue for the remaining 50 percent shall be included with the report required under Paragraph B.5.a.

c. The State shall calculate the Band's total share of the sales tax base, using sales tax collections reported to the State by the last day of the calendar quarter. The Band does not need to file a claim or report for its share of the sales tax base. The State shall pay the difference between the Band's total share of the sales tax base and the amounts retained by the Band under Paragraph B.5.b. The State's payment shall be made in accordance with Paragraph B.4 of this Section.

C. Records.

1. Upon reasonable request of the Band, and subject to the confidentiality provisions of this Agreement, the State shall make available to the Band all records relating to tax filings that relate to the composition of the tax base, including the list of vendors and the amount of sales tax collected from each

vendor during a period. Prior to receiving confidential information from the State, the person or persons who will review the records for the Band must sign a written statement whereby the person agrees to be subject to the disclosure laws of the State. The State will make best efforts to insure collection of all taxes from non-Band vendors that comprise the tax base.

2. The Band agrees to keep accurate records setting forth information in sufficient detail to allow for verification that the Band and Band-owned entities are collecting and remitting the correct amount of tax due pursuant to this Agreement. Upon reasonable request of the State, and subject to the confidentiality provisions of this Agreement, the State may conduct a limited examination of the records of the Band and Band-owned entities for the sole purpose of verifying compliance with the requirements of this Agreement. Such examination shall be strictly limited to those enterprise activities of the Band or Band-owned entities which engage in sales subject to the taxes collected pursuant to this Agreement and may include examination of summary reports, exemption certificates, ledgers, cash register tapes and similar records. Nothing in this section authorizes any examination of the records of any part of the Band or a Band-owned entity which does not engage in sales subject to the taxes collected pursuant to this Agreement, and nothing in this section authorizes any examination of any records that goes beyond what is needed to verify compliance with the requirements of this Agreement.

3. It is the intent of the State to perform no more than one examination under

paragraph 2 during any calendar year. However, the State reserves the right to request additional examinations if the State Commissioner reasonably believes that the Band or a Band-owned entity is materially underreporting taxes owed pursuant to this Agreement.

D. Remedies.

1. If the Band refuses to allow the State to inspect the records of the Band or Band-owned entities within sixty (60) days following reasonable request of the State, the State may terminate this Agreement in accordance with Section 9 for failure to abide by the terms of the Agreement.

2. The State may apply any payment due pursuant to this Agreement to any delinquent tax covered by this Agreement and finally determined pursuant to this section to be owed by the Band or a Band-owned entity. The Band may apply any payment due pursuant to this Agreement to any delinquent refund or tax sharing payment finally determined pursuant to this section to be owed by the State.

3. Upon completion of an examination of records by the State pursuant to this Agreement, the State shall issue a report to the Band containing the results. If the report indicates a change in liability of the Band or a Band-owned entity, the Band may challenge that report by either:

a. Requesting a redetermination from the State. The request must be made in writing within sixty (60) days following issuance of the report. The redetermination will be made consistent with the appeal provisions

contained in Minnesota Statutes § 289A.65.

and/or b. Requesting that the State enter into arbitration, pursuant to procedures established under the Uniform Arbitration Act. Such request must be made in writing within sixty (60) days following issuance of the report. Only issues concerning the accuracy of the tax calculation under applicable Minnesota law, as modified by this Agreement, may be decided by the arbitrator. Any issues concerning the jurisdiction of the State to impose a tax are expressly excluded from the scope of arbitration.

4. If the Band does not challenge the findings of the State within sixty (60) days after issuance of the report, then any additional tax assessed may be deducted from future payments made by the State to the Band pursuant to this Agreement until the assessment is paid in full. If an examination reveals an overpayment of tax collected pursuant to this Agreement, the amount of the overpayment shall be paid to the Band within thirty (30) days following the issuance of the report.

E. Assignment of Refunds and Payments.

1. Refunds and payments made pursuant to this Agreement may be pledged, assigned, or otherwise used as collateral or security by the Band through formal action of the Band for loans, promissory notes, or other financial transactions.

2. When refunds or payments are pledged, assigned, or otherwise used as security, a copy of the formal document of the Band authorizing such action shall be mailed or delivered to the State Commissioner. Following receipt of the

required documents, the State Commissioner shall issue future refunds and payments as directed by the documents until notified in writing by the secured party that the assignment has been terminated, or until notified in writing by the Band Commissioner, accompanied by a formal determination of the Band, that the assignment has been terminated, together with sufficient proof that such termination has occurred.

F. Confidentiality.

1. Tax information gathered by the State in the administration of this Agreement shall be protected and confidential to the same extent as the information is protected and confidential when gathered by the State in the administration of state tax laws pursuant to Minnesota Statutes ch. 270B and other Minnesota laws.

2. The Band agrees to protect the confidentiality of any information relating to this Agreement received from the State to the same extent as the information is protected from disclosure by the State pursuant to Minnesota Statutes ch. 270B and other Minnesota laws.

3. Breach of the confidentiality provisions of this Agreement constitutes grounds for termination under the provisions of this Agreement.

Section 9. Sovereign Immunity.

Nothing contained herein shall be construed in any fashion to be a waiver of the sovereign immunity of the Mille Lacs Band of Ojibwe Indians, its governing bodies, it officials, or its entities.

Section 10. Termination of the Agreement.

A. Either party may terminate this Agreement, with or without cause, at the end of any calendar year, upon ninety (90) days written notice. A notice of intent to terminate on behalf of the Band must be executed by the Band Commissioner. A notice of an intent to terminate on behalf of the State must be executed by the State Commissioner.

B. Upon the failure of either party to abide by the terms of this Agreement, the other party may terminate the Agreement at any time upon thirty (30) days written notice. If a court of competent jurisdiction issues a final order defining the boundaries of the Reservation, either party may terminate this Agreement at any time upon thirty (30) days written notice. The notices required in this paragraph must specify the reason or reasons that the Agreement is being terminated. A notice of termination on behalf of the Band must be executed by the Band Commissioner. A notice of termination on behalf of the State must be executed by the State Commissioner.

C. In the event of termination prior to the end of a calendar year, the State shall be obligated to remit the full quarterly remittances provided for according to the terms of this Agreement with respect to the calendar quarter during which notice of termination is given, including without limitation the quarterly remittance provided for in Section 5, Paragraph B.2; Section 6; Section 7, Paragraph D; and Section 8, Paragraphs B.4 and B.5, which obligation shall survive the termination of this Agreement. The Band agrees that until the end of the calendar quarter during which notice was given, all provisions relating to the collection and remittance of any tax under this Agreement remain in effect.

Section 11. Effective Date.

This Agreement shall be effective from January 1, 1997, for taxes incurred after December 31, 1996, provided that any payments that would have been due prior to the execution of this Agreement shall be due within 30 days after the execution of this Agreement by both parties.

IN WITNESS WHEREOF, the State and the Band have caused this Agreement to be executed and delivered by their duly authorized officers.

STATE OF MINNESOTA
DEPARTMENT OF REVENUE

By: James T. Thune
Commissioner of Revenue

Date Signed: 9/22/97

MILLE LACS BAND OF
OJIBWE INDIANS

By: Caroline Kennedy
Commissioner of Finance

Date Signed: 9/22/97

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THE MILLE LACS BAND OF
OJIBWE INDIANS
Legislative Branch of Tribal Government

RESOLUTION 07-04-123-97

A RESOLUTION APPROVING THE NEGOTIATED TAX AGREEMENT BETWEEN THE STATE OF MINNESOTA AND THE MILLE LACS BAND OF OJIBWE INDIANS.

WHEREAS, the Mille Lacs Band Assembly is the duly-elected governing body of the Mille Lacs Band of Ojibwe Indians, a federally-recognized Indian Tribe; and,

WHEREAS, the Commissioner of Finance has negotiated an agreement with the State of Minnesota entitled "AGREEMENT BETWEEN THE STATE OF MINNESOTA AND THE MILLE LACS BAND OF CHIPPEWA INDIANS", which provides for the exemption of the Band and Band members from certain State taxes, the refund of taxes paid by Band members to the Band, the sharing by the State and the Band of certain taxes paid by non-Band members, and related matters; and,

WHEREAS, the final draft of the agreement, with the legend "FINAL 8/5/97" is attached hereto; and,

WHEREAS, the Band Assembly has reviewed the attached final draft of the agreement and desires that the name of the Band in the agreement be changed to the "Mille Lacs Band of Ojibwe Indians" and that any typographical errors be corrected, but otherwise approves the agreement.

NOW, THEREFORE, BE IT RESOLVED, that, notwithstanding any other provision of Band law, the Commissioner of Finance is authorized to execute and enter into the agreement, with the changes noted above, on behalf of the Band.

WE DO HEREBY CERTIFY, that the foregoing resolution was duly concurred with and adopted at a regular session of the Band Assembly in Legislative Council assembled, a of legislators being quorum present held on the 10th day of September, 1997 at Vineland, Minnesota by a vote of _3_FOR, _0_AGAINST, _0_SILENT.

IN WITNESS WHEREOF, we, the Band Assembly hereunto cause to have set the signature of the Speaker of the Assembly to be affixed to this resolution and forwarded to the Chief Executive for Concurrence.

David Matrious, Speaker of the Assembly

IN CONCURRENCE, with the action of the Speaker of the Assembly, we, the Administrative Policy Board hereunto recommend to set the hand of the Chief executive to this resolution.

Marge Anderson, Chief Executive

OFFICIAL SEAL OF THE BAND

DISTRICT I
HCR 67 Box 194 • Onamia, MN 56359
(320) 532-4181 • Fax (320) 532-4209

DISTRICT II
Route 2 • Box 58 • McGregor, MN 55760
(218) 768-3311 • Fax (218) 768-3903

DISTRICT III
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THE CIGARETTE TAX GAP

Prepared by:
Donald Gutmann, Tax Policy Specialist
Research Division, Department of Revenue
September 3, 1997

The attached tables contain the latest estimates of the cigarette tax evasion gap for fiscal years 1997 and 1998. The methodology behind these estimates is outlined in this report. One of the inputs for the evasion estimates is the Forecast Council's March 1997 forecast of taxable cigarette consumption.

The gap is composed of two parts. The first represents legally exempt sales to military personnel and Native Americans on reservations. The second part reflects illegal evasion. Evasion is grouped into three general categories: casual smuggling, unauthorized sales on military installations and illegal Native American smokeshop sales. The size of each element and the lost revenues are estimated.

SIZE OF GAP

To estimate actual Washington consumption, information was obtained from a 1997 Washington Department of Health (DOH) study, Cigarette Consumption in Washington State. In this study, an estimate of actual consumption was made taking into consideration such factors as per capita income, level of tourism, level of cigarette taxes, neighboring state tax rates, religious and ethnic makeup, and geographic location.

The DOH estimated that Washington consumption was 86 percent of the United States per capita average. As Table 1 shows, U.S. per capita consumption was estimated at 91.6 packs for fiscal year 1997. Using the DOH estimate, Washington state consumption was 78.75 packs or 86 percent of the U.S. average. After subtracting Washington's taxable consumption of 57.6 packs the estimated tax gap for fiscal year 1997 is 21.15 packs per capita or 118.6 million packs. Table 2 shows the gap estimate for fiscal year 1998 to be 121.3 million packs.

For fiscal year 1997 we can attribute 22.44 million packs to legal sales to military personnel and their dependents and 5.76 million packs to legal sales to Native Americans on reservations. This leaves 90.43 million untaxed packs consumed in Washington in fiscal year 1997. For fiscal year 1998 it is estimated that there will be 93.51 million untaxed packs consumed in Washington.

REVENUE IMPACTS

Cigarettes in the state of Washington are subject to an 82.5 cent cigarette tax (23 cents for the general fund, 8 cents for water quality, 10.5 cents for drug programs and 41 cents for health care), as well as state and local sales taxes.

For fiscal year 1997 state revenues lost due to consumption of untaxed cigarettes totaled $89.7 million. Lost cigarette tax revenues were $74.6 million while lost state sales tax revenue was estimated at $14.1 million. For fiscal year 1996 lost state revenues totaled $93.4 million while lost cigarette taxes were $77.1 million.

SOURCES OF EVASION

Evasion is grouped into three general categories: illegal Native American smokeshop sales, unauthorized sales on military installations and casual smuggling. The original allocation of the evasion estimate among these three categories is explained along with the changes to that allocation.

The purchase of untaxed cigarettes on Native American reservations by non-tribal members is the major source of tax evasion. It is believed that smokeshops in Washington are buying unstamped cigarettes from wholesalers in other states. Based on an audit by the Bureau of Alcohol Tobacco and Firearms of a number of wholesalers in Montana and Idaho it was estimated that 60 percent of the total evasion estimate was purchased by non-tribal members from smokeshops.

Federal law requires that manufacturers report to the Department of Revenue on shipments of cigarettes into Washington. It was estimated that 11 percent of the total evasion estimate was purchased by non-military.

The third category of cigarette tax evasion is casual smuggling across state borders. Casual smuggling accounted for 29 percent of the evasion estimates.

This allocation among the three sources was changed to reflect the Forecast Council's assumptions on the consumer reactions to the changes in Oregon's cigarette taxes. The tax increased 30 cents in February 1997 but will decrease 10 cents in January 1998. It was assumed that these changes in the price of Oregon's cigarettes would only impact casual smuggling within Washington. The percentage attributed to casual smuggling decreased from 29 percent to 25 percent in fiscal year 1997 and to 22 percent in fiscal year 1998. The percentages attributed to the military and the tribes increased proportionally. The percentage attributed to the military increased from 11 percent to 12 percent in fiscal year 1997. The percentage for tribal sales increased from 60 percent to 63 percent in fiscal year 1997.

TABLE 1
CIGARETTE TAX EVASION ESTIMATE - FY 1997
CIGARETTE TAX RATE - 82.5 CENTS PER PACK

Per Capita Estimates:	
U.S. Per Capita Consumption	91.57 packs
Washington Per Capita Consumption *	78.75 packs
Washington Taxable Consumption **	57.60 packs
Washington Per Capita Gap Estimate	21.15 packs

Washington Population	5.608 million
Total Washington Loss	118.63 million packs
Less: Legitimate Military Sales ***	(22.44) million packs
Less: Legitimate Indian Sales	(5.76) million packs
Loss from Evasion	90.43 million packs

Revenue Losses:			$2.40 Cost Per Pack	
State Revenue Losses:			Tax Per Pack Cents	Revenues Millions
Cigarette Taxes				
General Fund			23.0	$20.8
Water Quality			8.0	7.2
Drug program			10.5	9.5
Health Care			41.0	37.1
			82.5	$74.6
Other State Excise Taxes:				
Sales Tax		6.5%	15.6	14.1
B&O Tax		0.4710%	1.1	1.0
	Total		99.2	$89.7
Local Revenue Loss:				
Local Sales Tax		1.5%	3.6	3.3
	Total		102.8	$93.0

Source of Evasion:		Packs	Dollars
Indian Sales	63.0%	57.0	$58.6
Military Sales	12.0%	10.9	11.2
Casual Smuggling	25.0%	22.6	23.2
Total	100.00%	90.4	$93.0

* Assumes that Washington residents per capita consumption is 86% of the U.S rate. (1997 DOH Study)
** Taxable per capita consumption is based on the Forecast Council's March 1997 forecast
*** Assumes 285,000 military and dependents consuming at the Washington per capita rate of 78.75

Department of Revenue
Research Division
August 11, 1997

TABLE 2
CIGARETTE TAX EVASION ESTIMATE - FY 1998
CIGARETTE TAX RATE - 82.5 CENTS PER PACK

Per Capita Estimates:	
U.S. Per Capita Consumption	89.87 packs
Washington Per Capita Consumption *	77.29 packs
Washington Taxable Consumption **	56.06 packs
Washington Per Capita Gap Estimate	21.23 packs

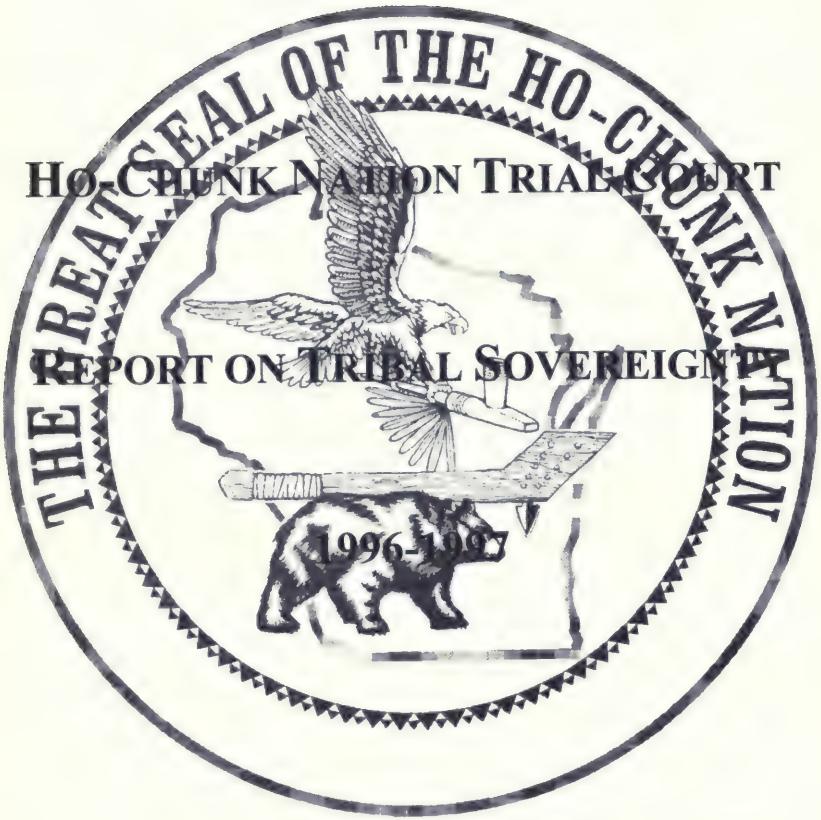
Washington Population	5.714 million
Total Washington Loss	121.30 million packs
Less: Legitimate Military Sales ***	(22.03) million packs
Less: Legitimate Indian Sales	(5.76) million packs
Loss from Evasion	93.51 million packs

Revenue Losses:			$2.50 Cost Per Pack	
State Revenue Losses:			Tax Per Pack Cents	Revenues Millions
Cigarette Taxes				
General Fund			23.0	$21.5
Water Quality			8.0	7.5
Drug program			10.5	9.8
Health Care			41.0	38.3
			82.5	$77.1
Other State Excise Taxes:				
Sales Tax		6.5%	16.3	15.2
B&O Tax		0.4710%	1.2	1.1
	Total		99.9	$93.4
Local Revenue Loss:				
Local Sales Tax		1.5%	3.8	3.5
	Total		103.7	$96.9

Source of Evasion:		Packs	Dollars
Indian Sales	66.0%	61.7	$64.0
Military Sales	12.0%	11.2	11.6
Casual Smuggling	22.0%	20.6	21.3
Total	100.00%	93.5	$96.9

* Assumes that Washington residents per capita consumption is 86% of the U.S rate. (1997 DOH Study)
** Taxable per capita consumption is based on the Forecast Council's March 1997 forecast.
*** Assumes 285,000 military and dependents consuming at the Washington per capita rate of 77.29

Department of Revenue
Research Division
August 11, 1997



HO-CHUNK NATION TRIAL COURT

REPORT ON TRIBAL SOVEREIGNTY

Submitted March 23, 1998

HO-CHUNK NATION TRIAL COURT REPORT ON TRIBAL SOVEREIGNTY

The Ho-Chunk Nation Trial Court strongly opposes the measure proposed in S. 1691 by Sen. Slade Gorton under consideration by the Senate Committee on Indian Affairs. The proposed language of the bill threatens to eviscerate tribal sovereignty as any individual could bring suit in state or federal court over a variety of claims. This proposal circumvents tribal governance and undermines the promise of autonomy established in the federal policy of Self-Determination. This Court believes that such a measure proves unnecessary as the assertions challenging the integrity and competency of tribal judiciaries remain unfounded. The proposed language exceeds the realistic concerns facing jurisprudence in Indian Country.

This Report seeks to educate the Senate Committee on Indian Affairs on the present status of the Ho-Chunk Nation Judiciary through a detailed analysis of case disposition over calendar years 1996 and 1997. The facts demonstrate that non-Indians enjoy equal access to due process, resources, and fairness in the Ho-Chunk Nation Court System. From a broader perspective, the record reflects the strong commitment of the Ho-Chunk Nation to build cooperative and mutually beneficial relationships with non-Indian individuals, organizations, and local governments.

OVERVIEW OF THE HO-CHUNK NATION COURT SYSTEM

On September 22, 1994, the Ho-Chunk Nation (formerly Wisconsin Winnebago) duly adopted a new CONSTITUTION which reorganized the governmental structure of the Nation and renewed the exercise of tribal sovereignty. The CONSTITUTION creates four branches of government: the Executive, the Legislative, the Judicial, and the General Council which is composed of all tribal members eligible to vote.

Elements of the Judicial Branch

Article VII details the structure, authority, jurisdiction, and qualifications of the Judiciary. The Trial Court is composed of the Chief Judge and other Associate Judges as deemed necessary who are appointed by the Nation's Legislature. Presently, there is one Associate Judge. The qualifications of both the Chief Judge and Associate Judge are established by the Legislature. No person convicted of a felony is eligible to serve on the Trial Court unless pardoned. The Trial Court enjoys original jurisdiction over all cases and controversies in law and equity arising under the CONSTITUTION, laws, and customs and traditions of the Ho-Chunk Nation. The Trial Court maintains the power to make findings of fact and conclusions of law, to issue all remedies in law and equity including injunctive and declaratory relief. Although this authority extends explicitly over criminal and civil jurisdiction, the Nation does not exercise criminal jurisdiction at this time.

A Chief Justice and two Associate Justices preside over the Supreme Court who are elected by majority vote of eligible voters. The Chief Justice serves a six (6) year term and until a replacement is found after proper election and installment. The Chief Justice must be at least forty (40) years old and an attorney admitted to practice in any state and before the Ho-Chunk Courts. Originally, the two Associate Justices served a four year and two year term, where the candidate receiving the highest number of votes occupied the longer term of office. Now the Associate Justices serve four year staggered terms. No person convicted of a felony is eligible to serve on the Supreme Court unless pardoned. Whereas the right of appeal on any judgment or verdict of the Trial Court is

preserved in the CONSTITUTION, the Supreme Court exercises appellate jurisdiction over any case on appeal from the Trial Court. The Supreme Court may interpret the laws and CONSTITUTION of the Nation and make conclusions of law but may not make findings of fact except as provided by enactment of the Legislature.

The CONSTITUTION provides further guidance on standards of judicial conduct. Any Justice or Judge with a direct personal or financial interest in any matter before the Judiciary must recuse himself or herself. Failure to do so constitutes cause for removal in accordance with constitutional procedures. The Legislature then appoints a Justice or Judge pro tempore to fill any vacancy due to recusal. As Judges and Justices have recused themselves a number of times for a variety of reasons in order to avoid the appearance of impropriety, the Judiciary maintains a list of available pro tempore individuals. Furthermore, no increase or decrease in compensation for Justices or Judges may take effect until after the next election or appointment to the specific office.

The JUDICIARY ACT OF 1995 further defines the role of the Judicial Branch and creates a forum of special jurisdiction for traditional dispute resolution which is authorized by the CONSTITUTION. At present there are three bodies in the Nation's Court System: the Trial Court, the Supreme Court, and an independent Traditional Court. The Traditional Court is comprised of recognized leaders of the various clans who provide advice or resolve disputes in accordance with the customs and traditions of the Ho-Chunk Nation. When a party seeks to resolve a dispute with another tribal member, both parties voluntarily must consent in writing to the jurisdiction of the Traditional Court for which no right to appeal exists. As the vast majority of proceedings in the Traditional Court take place in the Ho-Chunk language, interpreters may be required at the expense of the party.

The Ho-Chunk Nation Bar Association

The Ho-Chunk Nation Court System also has an active Bar Association which operates under the auspices of the Supreme Court. Applicants must submit a number of documents including proof of admission and good standing in any state, affidavits of two (2) attorneys attesting to character, and a filing fee. The Bar Association is presently composed of thirty-four (34) individuals, of which twenty-two (22) are non-Indian. Attorneys who wish to appear on a one time basis may appear *pro hac vice* in lieu of full membership in the Bar upon proper motion.

In conjunction with the Wisconsin Tribal Judges Association, the Trial Court recently supervised the education and certification of six (6) Lay Advocates who may gain admission to the Bar Association to practice in any of the Nation's Courts. The Lay Advocates also may practice in any of the other Wisconsin tribal courts after proper request and admission. The Lay Advocates represent a group of dedicated tribal members who remain available to take cases for Indians and non-Indians alike who might not have access to a judicial forum whether due to the expense of attorneys' fees or lack of familiarity with the system.

Available Resources

The Court System sponsors a number of outreach programs which provide state-approved CLE credit for Bar Association members as well as other attorneys who wish to attend. The largest such program is the Ho-Chunk Nation Law Day held in late August on an annual basis in which tribal,

state, and federal law may be considered in a serious forum. Recent efforts to build relationships with surrounding counties on the issue of child support enforcement have proven particularly successful.

The Court System also maintains a well-stocked law library open to the public during regular office hours. The library offers primary resources on state and federal law, as well as a large number of secondary resources on specific topics. These areas include: Indian law, employment law, administrative law, trial advocacy, and evidence. Ideally, the library eventually will offer Internet access and CD-Rom based materials for those who wish to perform additional research. A number of other advocacy materials are available for usage such as a video camera for depositions, TV-VCR, and a large assortment of audio-visual equipment to assist in Court presentations.

HCN Trial Court Cases Filed in 1996

During the 1996 calendar year, individuals filed ninety-four (94) cases in the Ho-Chunk Nation Trial Court. *See, Appendix A.* Of these cases, only one (1) remains pending at the Trial Court level. As the claims may be categorized in a number of ways, this Report creates two broad categories with assorted subdivisions according to native and non-native interests. Those cases implicating only the interests of the Ho-Chunk Nation which properly fall within self-government include membership, trust funds, constitutional challenges, and probate. A subcategory under the "internal" cases which will be treated separately involves the enforcement of child support obligations. This independent analysis is justified due to the high caseload, the variety of interests represented, and the policy and administration underlying such cases. The remaining category involves those cases which might affect non-Indians, including employment disputes, contract claims, and tort actions.

Cases Involving Self-Government

At the outset, one should recognize that fifty-nine (59) of the ninety-four (94) cases involved matters of the Ho-Chunk Nation and its members which may be characterized as internal. As such, jurisdiction over these claims rests exclusively within the HCN Judiciary. Although the interests of others may be implicated, these cases do not add or detract from the legal rights of non-members. This amount represents 63% of the entire caseload filed during calendar year 1996. Thirty-nine (39) of these cases involved the enforcement of child support obligations against tribal member's per capita distribution. Three (3) cases involved enrollment and membership issues. Twelve (12) cases represented petitions to access per capita trust funds on behalf of minor children or adult incompetents. Four (4) constitutional cases were filed. One (1) probate case was filed.

Cases Affecting Non-Indians

The remaining thirty-five (35) cases may be characterized as those other actions which potentially involve non-Indian individuals such as employment disputes, contract claims, and tort actions.

Employment Disputes

Employment disputes constituted twenty-five (25) of the thirty-four (34) cases, wherein thirteen (13) claims affected non-Indian interests. Of these thirteen (13) cases, four (4) were settled to the benefit

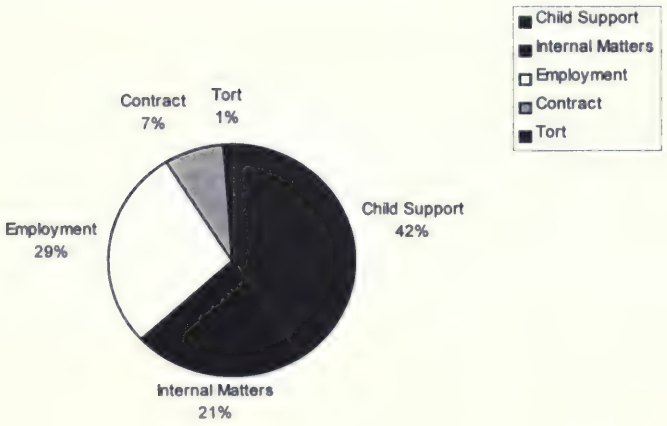
of the non-Indian. In two (2) cases, the non-Indian claims won full judgments in their favor. One (1) case was voluntarily withdrawn. One (1) case remains pending on appeal to the Nation's Supreme Court. The remaining five (5) cases were dismissed by the Trial Court. In three (3) of these instances, the plaintiffs never bothered to appear at Court and the claims were dismissed for want of prosecution. The two (2) remaining claims were dismissed for lack of substantive evidence. In the related area of employment claims involving the Ho-Chunk Nation Gaming Commission and the revocation of gaming licenses, of the two (2) cases in 1996 only one (1) involved a non-Indian and his claim was settled.

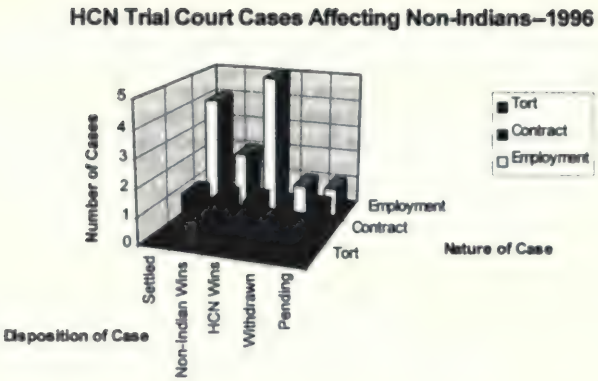
Contract Claims

There were a total of seven (7) contract causes of action filed in 1996 where four (4) claims involved non-Indians. One case was dismissed as a result of the doctrine of *res judicata*. In the only creditor action filed in the Trial Court during 1996, the non-Indian plaintiff recovered in full. One (1) insurance claim by a non-Indian proved favorable as a successful settlement was reached. One (1) claim remains pending in anticipation of trial.

Tort Actions

Finally, only one (1) tort action was filed for personal injury where the case ultimately was dismissed for lack of jurisdiction over the non-Indian defendant.





HCN TRIAL COURT CASES FILED IN 1997

During the 1997 calendar year, individuals filed one hundred and seventy-two (172) cases in the Ho-Chunk Nation Trial Court. *See, Appendix A.* As the claims may be categorized in a number of ways, this Report creates two broad categories with assorted subdivisions according to native and non-native interests. Those cases involving only the interests of the Ho-Chunk Nation which properly fall within self-government include membership, trust funds, constitutional challenges, and probate. A subcategory under the "internal" cases which will be treated separately involves the enforcement of child support obligations. This independent analysis is justified due to the high caseload, the variety of interests represented, and the policy and administration underlying the child support cases.

Cases Involving Self-Government

At the outset, one should recognize that one hundred and thirty-six (136) of the one hundred and seventy-two (172) cases involved matters of the Ho-Chunk Nation and its members which may be characterized as internal. Jurisdiction over these claims rests exclusively within the HCN Judiciary. Although the interests of others may be implicated, these cases do not add or detract from the legal rights of non-member Indians or non-Indians. This amount represents 79% of the entire caseload filed during calendar year 1997. One hundred and fifteen (115) of these cases involved the enforcement of child support obligations against tribal member's per capita distribution. Two (2) cases involved enrollment and membership issues. Six (6) election cases were filed and decided. Nine (9) cases represented petitions to access per capita trust funds on behalf of minor children or adult incompetents. Two (2) constitutional cases were filed. Two (2) probate cases were filed.

Cases Affecting Non-Indians

The remaining thirty-six (36) cases may be characterized as those other actions which potentially involve non-Indian individuals such as employment disputes, contract claims, and tort actions.

Employment Disputes

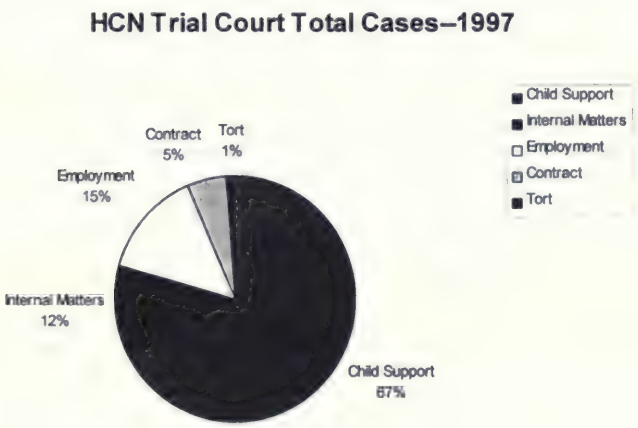
Employment disputes constituted twenty-five (25) cases, wherein thirteen (13) claims affected non-Indian interests. Of these thirteen (13) cases, six (6) were settled to the benefit of the non-Indians involved. One (1) claim was dismissed for lack of substantive evidence. Six (6) cases remain pending at the Trial Court level. There were no Gaming Commission cases involving non-Indians filed in the Trial Court for calendar year 1997.

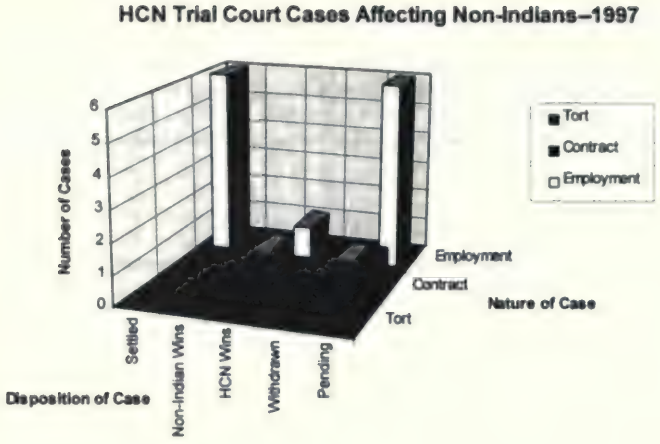
Contract Claims

There were a total of nine (9) contract causes of action filed in 1997 where one (1) involved the interests of a non-Indian. This case remains pending in anticipation of trial.

Tort Actions

Finally, while two (2) tort actions were filed for personal injury in 1997, neither case involved or affected non-Indians.





HCN TRIAL COURT CHILD SUPPORT ENFORCEMENT CASES

A remarkable accomplishment in the Ho-Chunk Nation Trial Court's short history involves the registration and enforcement of child support orders issued by other courts against tribal members in the Nation's Court System. The record demonstrates that petitions are brought by non-Indian custodial parents, relatives, guardians, and even state and local agencies. The significance of child support enforcement therefore deserves independent treatment and consideration.

Early on, the Nation's Legislature sought to provide for Ho-Chunk children by ensuring a source of income for their benefit, health, and welfare. With the inception of a quarterly per capita distribution to tribal members, a source of funds exists which the Court may attach. In the long run, this policy also protects adult tribal members by keeping them out of legal trouble for failure to meet child support obligations. The perpetuation of this distribution, and therefore the success of this enforcement, remains contingent on the viability of gaming. At present the status of gaming in Wisconsin is subject to the political elements of compact negotiations.

Fortunately, the Ho-Chunk Nation designed a thorough and straightforward statutory scheme which has met the unanticipated demand that child support enforcement represents. Along with ADOPTED WISCONSIN CHILDREN'S CODE, CHAPTER 48, the Nation's Legislature has passed three specific laws concerning this issue: APPROVED AMENDED AND RESTATED PER CAPITA DISTRIBUTION ORDINANCE, CLAIMS AGAINST PER CAPITA ORDINANCE, and RECOGNITION OF FOREIGN CHILD SUPPORT ORDERS ORDINANCE. *See, Appendix B.* These three ordinances create a tribal framework of laws which parallel state law and policy, but do not simply replicate them.

Almost forty-two percent (42%) of all cases filed in calendar year 1996 were child support enforcement actions. During calendar year 1997, the amount rose to almost sixty-seven percent (67%) and represented claims from nineteen (19) Wisconsin counties. Whereas these cases necessarily involve children enrolled or eligible for enrollment in the Ho-Chunk Nation and depend upon tribal funds distributed in the discretion of the Nation, child support enforcement remains unique. Although this subcategory may be characterized as an internal matter which does not create a legal right in non-members, from a practical standpoint a large class of non-members benefit from this policy.

During the February, May, August, and November 1997 quarterly distributions, it is estimated that the Trial Court collected approximately $207,940.99 toward current and back child support owed to Ho-Chunk children and disbursed these funds to the relevant counties and agencies to ensure proper credit to the payor parent. In the February 1998 distribution alone, the Trial Court issued *Orders* providing for $83,288.35 in current and back child support. *See, Appendix C.* With three remaining distributions in 1998, projected interceptions could reach as high as $333,000 for the entire year. Beyond a doubt, the Ho-Chunk Nation Trial Court has made concerted efforts in the areas of outreach and cooperation, and in the process has achieved productive results.

The HCN Trial Court does not independently enter judgments creating child support obligations against tribal members. Rather, the majority of business at the HCN Trial Court revolves around the registration and enforcement of foreign child support orders from surrounding counties, tribes, and even other states against the per capita distributions paid to all tribal members on a quarterly basis pursuant to existing law. These claims may be brought to the Nation's Courts by custodial parents, grandparents, or legal guardians regardless of Indian or non-Indian status. In fact, of the one-hundred and fifteen (115) child support cases filed in 1997, forty-nine (49) were brought by the State of Wisconsin through various counties either on behalf of the custodial parent or on its own behalf to recover arrears.

In December 1997, the Trial Court hosted a ground breaking meeting with surrounding counties to address child support enforcement concerns, discuss the differences and similarities of tribal and state law, and work toward a more cooperative relationship. The meeting proved so successful that the Trial Court was invited to participate in the March 1998 Wisconsin Child Support Enforcement Association's Spring Training Conference to make a presentation on registering foreign orders in the Ho-Chunk Nation Trial Court. The level of sophistication and cooperation in this area has become widely recognized.

Limited Waiver of Sovereign Immunity

On March 26, 1996, the Ho-Chunk Nation Legislature issued Resolution No. 3/26/96-A as an amendment to the Nation's Policies and Procedures Manual providing a limited waiver of sovereign immunity for employment grievances. *See, Appendix D.* The Resolution expressly creates remedies permitting monetary damages in the maximum amount of $2,000 and reassignment. In accordance with general principles of administrative law, the Resolution requires that a grievant exhaust his or her remedies on the agency or department level pursuant to the multi-tiered Administrative Review Process detailed in the Policies and Procedures Manual.

Resolution 3/26/96-A was explicitly passed to provide a cause of action available to all tribal employees, whether Indian or non-Indian, who wish to pursue any grievances in a judicial forum. Furthermore, the original amendment had a retroactive effect of over one year in order to permit employees to file requests for reconsideration of past cases.

Although Resolution No. 3/26/96-A represents a significant effort on the part of the Nation to waive sovereign immunity under certain circumstances, instances arose where it made good sense to expand the limited waiver of sovereign immunity. On February 19, 1998, the Ho-Chunk Nation Trial Court proposed amendments to the Resolution which would expand the equitable remedies available to tribal employees and increase the recovery ceiling to either $10,000 or remove it altogether. *See, Appendix D.* The Trial Court presented substantial documentation to support the position that such expanded waivers of sovereign immunity remain in the best interest of the Nation. The documents and materials demonstrate that Indian and non-Indian share common interests as employees of the Nation. The proposal also details the competency and dedication of the Trial Court in addressing employment grievances. This information was offered to the Ho-Chunk Nation Legislature where it presently rests in anticipation of further discussion and consideration.

CONCLUSION

The Ho-Chunk Nation Trial Court provides this Report as evidence in opposition to proposed S. 1691 currently before the Senate Committee on Indian Affairs. This Report also seeks to educate those who remain unfamiliar with the competency and diligence of tribal judicial systems. While the proposed legislation relies on a nonrepresentative sample supported through anecdote, the measure fails to recognize the success stories where native tribes may exercise true self-determination. This Report on the Ho-Chunk Nation Trial Court provides insight into building cooperative relationships between native and non-native communities and dispels any myths regarding the degree of fairness one might achieve in Indian Country. As a result, proposed S. 1691 ultimately proves unnecessary for the concerns it attempts to address are already met under tribal judicial systems.

APPENDIX A

HCN Trial Court Cases and Disposition Table

1996-1997

HCN Trial Court Cases and Dispositions

March 10, 1998

ER	CV 96-01	*Dallas R. White v. HCN Enrollment Office* - transferred to Traditional Court: ADR
EM	CV 96-02	*Anne Rae Funmaker v. Kathryn Doornbos and HCN* (HCN Tr. Ct., Nov. 22, 1996) *aff'd* (HCN S. Ct., March 25, 1997)
EM	CV 96-03	*Dennis Funmaker v. Kathryn Doornbos and HCN* (HCN Tr. Ct., Aug. 22, 1996)
EM	CV 96-04	*Christine M. Hall v. HCN Dept. of Social Services* **Withdrawn**
EM	CV 96-05	*Carol J. Ravet v. HCN Health Department* (HCN Tr. Ct., Aug. 29, 1996)
CN	CV 96-06	*C&B Investments v. HCN Health Dept. and HCN* (HCN Tr. Ct., Nov. 21, 1996), *aff'd* (HCN S. Ct., Jan. 20, 1997)
EM	CV 96-07	*Susan Bosgraff v. HoChunk Casino and HCN* (HCN Tr. Ct., Aug. 28, 1996) **Settled**
EM	CV 96-08	*Susan Bosgraff v. HoChunk Casino and HCN* (HCN Tr. Ct., Aug. 28, 1996) **Settled**
EM	CV 96-09	*Laura Rozek v. HoChunk Casino and HCN* (HCN Tr. Ct., June 25, 1996) **Dismissed**
AP	CV 96-10	*Sandra Sliwicki v. Rainbow Casino* (HCN Tr. Ct., December 9, 1996)
EM	CV 96-11	*Edward Fronk v. Ho-Chunk Tours* (HCN Tr. Ct., June 19, 1996) **Dismissed**
EM	CV 96-12	*Gordon Snowball v. HoChunk Casino* (HCN Tr. Ct., November 20, 1996)
EM	CV 96-13	*Sarah A. Siegler v. HoChunk Casino* (HCN Tr. Ct., Sept. 6, 1996) **Settled**
EM	CV 96-14	*Angie Waege v. HCN Department of Justice* (HCN Tr. Ct., December 5, 1996) **Settled**
EM	CV 96-15	*Jean Day et al., v. HCN Personnel Department* (HCN Tr. Ct., Feb. 27, 1997)
EM	CV 96-16	*Andrea Gale Storm v. John Steindorf, Robert Mann and Daniel Brown* (HCN Tr. Ct., December 6, 1996)
EM	CV 96-17	*Max Funmaker v. Ho-Chunk Nation* (HCN Tr. Ct., Nov. 20, 1996)
EM	CV 96-18	*Melissa A. Johnson v. HCN Education Department* (HCN Tr. Ct., June 5, 1996) **Dismissed**
EM	CV 96-19 SU 96-04	*Donaldson A. June v. Kate Doornbos, HCN Administration Department* (HCN Tr. Ct., May 22, 1996); *Motion for Reconsideration* (HCN Tr. Ct., June 24, 1996); *erratum* (HCN Tr. Ct., July 17, 1996); *rev'd and remanded, Doornbos, HCN Administration Department v. Donaldson A. June* (HCN S. Ct., July 16, 1996); *Donaldson A. June v. Kate Doornbos, HCN Administration Department* (HCN Tr. Ct., Jan. 30, 1997).
EM	CV 96-20	*Rita Cleveland v. John Steindorf and HCN* (Stay issued, Sept. 26, 1996)
CN	CV 96-21	*Roger Littlegeorge v. Chloris A. Lowe, Jr., and Kathyleen Lone Tree Whiterabbit, as Chairman and Secretary of the April 27, 1996 General Council* (HCN Tr. Ct., June 4, 1996) **Settled**

[AP- appeal pending; CN- constitutional; CS- child support; CT- contempt; D- debt; EL- election; EM- employment; ER- enrollment; GC- gaming; GR-guardianship; INS-insurance; K-contract; PB-probate; PI-tort/personal injury; TR- trust]

CN	CV 96-22	*Coalition for Fair Government II v. Chloris A. Lowe, Jr., as Chairman of the April 27, 1996 General Council and Kathyleen Lone Tree Whiterabbit, As Secretary of the April 27, 1996 General Council* (HCN Tr. Ct., Jan. 3, 1997)
CN	CV 96-23	*Jerry Greengrass v. HCN Legislature* **Withdrawn**
CN	CV 96-24	*HCN Legislature v. Chloris A. Lowe, Jr., President* (HCN Tr. Ct., Jan. 3, 1997)
CS	CV 96-25	*Jacquelyn Wells v. Wesley D. Brockhaus* (HCN Tr. Ct., April 15, 1997); *renewed* (HCN Tr. Ct., Oct. 15, 1997); *modified and renewed* (HCN Tr. Ct., Jan. 6, 1998)
CS	CV 96-26	*Jacquelyn Wells v. Kurtis Brockhaus, Sr.* (HCN Tr. Ct., May 5, 1997); *renewed* (HCN Tr. Ct., Oct. 15, 1997)
TR	CV 96-27	*Marian Blackdeer v. HCN Enrollment Department* (HCN Tr. Ct., Aug. 22, 1996)
PB	CV 96-28	*Charles, William, and Percy Miner v. Geraldine Swan* (HCN Tr. Ct., Feb. 12, 1998) **Settled**
CS	CV 96-29	*J. M. Stacy-Snow v. Barry Lee Blackhawk* (HCN Tr. Ct., March 21, 1997) **Dismissed**
ER	CV 96-30	*Sheila White Eagle v. Ho-Chunk Nation* (HCN Tr. Ct., Jan. 27, 1997)
K	CV 96-31	*Roger Littlegeorge v. ~~Chloris Lowe, President, HCN Legislature and General Council~~, Jo Deen Lowe and Brian Pierson* (HCN Tr. Ct., Sept. 20, 1996), *reversed, Littlegeorge v. Jo Deen Lowe and Brian Pierson*, SU96-07 (HCN S. Ct., December 23, 1996)
D	CV 96-32	*U.W. Stevens Point v. Orbert Goodbear* (HCN Tr. Ct., Sept. 27, 1996)
GC	CV 96-33	*Francis P. Rave, Sr. v. HCN Gaming Commission* (HCN Tr. Ct., April 23, 1997); *modified* (HCN Tr. Ct., Oct. 9, 1997)
CS	CV 96-34	*Crystal E. Akeen v. Carlos D. Naki* (HCN Tr. Ct., April 23, 1997) **Dismissed**
K	CV 96-35	*Ann Abelle Lowe v. Serena Yellow Thunder* (HCN Tr. Ct., Nov. 15, 1996)
CS	CV 96-36	*Sherri Red Cloud v. Marlin Red Cloud* (HCN Tr. Ct., Oct. 15, 1996); *modified* (HCN Tr. Ct., Sept. 15, 1997)
CS	CV 96-37	*Sherri Red Cloud v. Maynard Rave, Sr.* (HCN Tr. Ct., Oct 15, 1996); *amended* (HCN Tr. Ct., Nov. 8, 1996)
TR	CV 96-38	*In Re: Julia Hare York v. HCN Enrollment Dept.* (HCN Tr. Ct., Oct. 9, 1996)
TR	CV 96-39	*In the Interest of Gary Alan Funmaker, Sr. v. HCN* (HCN Tr. Ct., Oct. 18, 1996)
PI	CV 96-40	*Angie Waege v. Steve Camden* (HCN Tr. Ct., March 26, 1997) **Dismissed**
TR	CV 96-41	*In the Interest of Harold Funmaker by Carol Naquayouma v. Ho-Chunk Nation* (HCN Tr. Ct., December 2, 1996); (HCN Tr. Ct., June 6, 1997)
EM	CV 96-42	*Kim Getts v. HoChunk Casino* (HCN Tr. Ct., Nov. 4, 1996) **Dismissed**
EM	CV 96-43	*Kelly Hammes v. HCN* (HCN Tr. Ct. 1996) **Settled**

INS	CV 96-44	*Daniel T. Williams v. HCN Div. of Risk Management, Laura Soap and Dr. John Noble* (HCN Tr. Ct., Jan. 13, 1997) **Settled**
ER	CV 96-45	*Kathy Ruditys, Tammy Schoona and Jim Wanty v. HCN Enrollment* (HCN Tr. Ct., April 7, 1997) **Dismissed**
TR	CV 96-46	*In Re: Bruce Patrick O'Brien v. HCN Enrollment Dept.* (HCN Tr. Ct., Nov. 15, 1996)
K	CV 96-47	*Jeremy Rockman v. Jo Ann Jones* **Dismissed** (HCN Tr. Ct., Nov. 8, 1996), *aff'd* (HCN S. Ct., March 24, 1997); *Final Order*, (HCN Tr. Ct., Sept. 23, 1997)
CS	CV 96-48	*Melanie Stacy-West v. Harrison Funmaker* (HCN Tr. Ct., Sept. 24, 1996)
TR	CV 96-49	*In Re: Roberta Goodbear v. HCN Enrollment Dept.* (HCN Tr. Ct., Nov. 14, 1996); (HCN Tr. Ct., Sept. 16, 1997); (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 96-50	*Lisa Harrison v. Rex Whitegull* (HCN Tr. Ct., Jan. 6, 1997); *modified* (HCN Tr. Ct., Jan. 13, 1998); *erratum* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 96-51	*Bonita Roy v. Paul Sallaway* (HCN Tr. Ct., Jan. 15, 1997); *amended* (HCN Tr. Ct., March 20, 1997)
EM	CV 96-52	*David Abangan, HCN Wo-Lduk v. Karena Day* (HCN Tr. Ct., Nov. 25, 1996); [case reopened on alleged breached on settlement]; *dismissed, Karena Day v. Berna Big Thunder, Sherry Wilson, Brenda Anhalt, and David Abangan, HCN Wo-Lduk Editor*, (HCN S. Ct., March 8, 1997)
EM	CV 96-53	*Carol Smith v. Rainbow Casino and Bernice Cloud* (HCN Tr. Ct., July 24, 1997); *aff'd in part, rev'd in part* (HCN S.Ct., Jan. 9, 1998)
CS	CV 96-54	*Veronica Wilbur v. Bernard L. Crow* (HCN Tr. Ct., Jan. 15, 1997); *modified* (HCN Tr. Ct., Sept. 4, 1997)
CS	CV 96-55	*Eileen Snowball v. Martin Falcon* (HCN Tr. Ct., May 21, 1997)
CS	CV 96-56	*Christie Flick v. Orin White Eagle* (HCN Tr. Ct., Jan. 7, 1997)
CS	CV 96-57	*Karena Day v. Kevin Day* (HCN Tr. Ct., May 7, 1997)
CS	CV 96-58	*Vicki Houghton v. John C. Houghton, Jr.* (HCN Tr. Ct., Jan. 23, 1997); (HCN Tr. Ct., Dec. 10, 1997); *modified* (HCN Tr. Ct., Jan. 29, 1998)
GC	CV 96-59	*Steven Camden v. HCN Gaming Commission* (HCN Tr. Ct., Oct. 21, 1997) **Settled**
TR	CV 96-60	*Frank Johnson, Sr. v. HCN Enrollment* (HCN Tr. Ct., Jan. 3, 1997)
CS	CV 96-61	*Tameria Funmaker v. Harrison Funmaker* (HCN Tr. Ct., Nov. 11, 1996)
CS	CV 96-62	*Melissa McGill v. Paul Smith* (HCN Tr. Ct., Nov. 15, 1996); *renewed* (HCN Tr. Ct., Jan. 12, 1998)
K	CV 96-63	*David Ujke v. HCN*

TR	CV 96-64	*In Re: Children of Joni Munnel* (Order Setting Trust) (HCN Tr. Ct., December 6, 1996)
CS	CV 96-65	*Katherine E. Snow v. Edward T. Decorah* (HCN Tr. Ct., May 12, 1997); *modified* (HCN Tr. Ct., Sept. 29, 1997)
CS	CV 96-66	*Melissa McGill v. Jones Decorah* (HCN Tr. Ct., Jan. 17, 1997); *modified* (HCN Tr. Ct., Jan. 7, 1998)
TR	CV 96-67	*In the Interest of Mary Littlegeorge by Sara Abbott v. Ho-Chunk Nation Enrollment Department* (HCN Tr. Ct., Feb. 14, 1997)
CS	CV 96-68	*David Orozco v. Janita Orozco* (HCN Tr. Ct., Jan. 15, 1997); *renewed* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 96-69	*Stuart Taylor v. Tammy (Taylor) Garvin* (HCN Tr. Ct., March 17, 1997)
CS	CV 96-70	*State of Wisconsin v. Dallas George White* (HCN Tr. Ct. November 26, 1996)
CS	CV 96-71	*State of Wisconsin v. Waldo E. Stacy* (HCN Tr. Ct., November 26, 1996); *modified* (HCN Tr. Ct., Jan. 6, 1998)
CS	CV 96-72	*State of Wisconsin v. Melinda Blackcoon* (HCN Tr. Ct., Jan. 3, 1997)
CS	CV 96-73	*State of Wisconsin v. Christopher Cloud* (HCN Tr. Ct., November 26, 1996)
CS	CV 96-74	*Renea A. Perez v. Roger D. Wallace* (HCN Tr. Ct., April 25, 1997) **Dismissed**
CS	CV 96-75	*Shari Jo Link v. Nelson Anderson Funmaker* (HCN Tr. Ct., April 25, 1997); *erratum* (HCN Tr. Ct., Jan. 12, 1998)
TR	CV 96-76	*In the Interest of Jessica Decorah by Mary Decorah v. HCN* (HCN Tr. Ct., Jan. 30, 1997)
AP	CV 96-77	*Brian Hobart v. Majestic Pines Casino* (HCN Tr. Ct., April 21, 1997) **Dismissed**
TR	CV 96-78	*In the Interest of Merecedes Blackcoon by Dale Hazard v. HCN Enrollment* (HCN Tr. Ct., Jan. 30, 1997); (HCN Tr. Ct., Oct. 2, 1997); (HCN Tr. Ct., Mar. 9, 1998)
CS	CV 96-79	*Melissa Smith v. Paul Smith* (HCN Tr. Ct., Dec. 20, 1996)
CS	CV 96-80	*Rhonda Funmaker v. John Holst* (HCN Tr. Ct., Jan. 13, 1997)
CS	CV 96-81	*Jackson County Foster Care, Eunice Greengrass and Carmella Root v. Karla Greengrass* (HCN Tr. Ct., Dec. 20, 1996)
CS	CV 96-82	*Katherine Snow v. Edward Decorah* (HCN Tr. Ct., May 12, 1997)
CS	CV 96-83	*Eunice Wamego v. Edward Decorah* (HCN Tr. Ct., May 12, 1997); *modified* (HCN Tr. Ct., Sept. 29, 1997)
CS	CV 96-84	*Debra K. Crowe v. Foster D. Cloud* (HCN Tr. Ct., Feb. 3, 1997)
CS	CV 96-85	*Winona Funmaker v. Mathew H. McKee* (HCN Tr. Ct., Feb. 26, 1997)

CS	CV 96-86	*Dawn Young v. Dion Thompson* (HCN Tr. Ct., Jan. 17, 1997)
TR	CV 96-87	*In the Interest of Myron Funmaker by Judith Thundercloud v. HCN* (HCN Tr. Ct., Feb. 28, 1997); (HCN Tr. Ct., Oct. 31, 1997)
EM	CV 96-88	*Joan Whitewater v. Millie Decorah and Sandy Martin* (HCN Tr. Ct., Jan. 20, 1998)
CS	CV 96-89	*State of Wisconsin and Debra A. Streeter v. Marcel R. Decorah* (HCN Tr. Ct., Jan. 27, 1997)
CS	CV 96-90	*Kelley Thundercloud v. Wallace P. Greendeer* (HCN Tr. Ct., Feb. 14, 1997)
CS	CV 96-91	*State of Wisconsin v. Arnold Cloud* (HCN Tr. Ct., Feb. 10, 1997)
CS	CV 96-92	*State of Wisconsin v. Tricia Stabler* (HCN Tr. Ct., Jan. 27, 1997)
CS	CV 96-93	*Kathleen Waukau v. Eldon D. Powless* (HCN Tr. Ct., Feb. 10, 1997)
EM	CV 96-94	*Joelene Smith v. Tammy Lang and HCN* (HCN Tr. Ct., May 7, 1997) **Pending on Appeal**
CS	CV 97-01	*Lucy Snake v. Roger Snake* (HCN Tr. Ct., Feb. 14, 1997)
CS	CV 97-02	*Roberta Greendeer v. Fredrick K. Greendeer* (HCN Tr. Ct., Jan. 14, 1997); *modified* (HCN Tr. Ct., Jan. 15, 1998)
TR	CV 97-03	*In the Interest of Lucinda Littlesolider by Helen Littlesoldier v. Ho-Chunk Nation* (HCN Tr. Ct., Feb. 19, 1997); (HCN Tr. Ct., April 9, 1997)
CS	CV 97-04	*Verna M. Rieder v. Quentin Thundercloud* (HCN Tr. Ct., March 26, 1997)
K	CV 97-05	*Ho-Chunk Housing Authority v. Lucinda Naquayouna* (HCN Tr. Ct., April 9, 1997)
CS	CV 97-06	*Nicole Ward v. Daryl DeCora* (HCN Tr. Ct., Jan. 15, 1997)
CS	CV 97-07	*Tris Y. Yellowcloud v. Jeffrey Link* (HCN Tr. Ct., Jan. 15, 1997); *modified* (HCN Tr. Ct., Sept. 15, 1997)
CS	CV 97-08	*Colette A. Guy v. John Cloud* (HCN Tr. Ct., April 3, 1997)
CS	CV 97-09	*Anita M. Carrimon v. Albert R. Carrimon* (HCN Tr. Ct., March 20, 1997)
CS	CV 97-10	*State of Wisconsin v. Marcus L. Big John* (HCN Tr. Ct., Feb. 25, 1997)
CS	CV 97-11	*State of Wisconsin v. Isaac W. Greyhair* (HCN Tr. Ct., Feb. 25, 1997); *modified* (HCN Tr. Ct., Jan. 13, 1998)
CN	CV 97-12	*Chloris A. Lowe, Jr. v. HCN, HCN Legislature, and HCN General Council* (Order Denying Preliminary Injunction) (HCN Tr. Ct., March 21, 1997); *erratum* (HCN Tr. Ct., April 3, 1997), *cert. denied* (HCN S. Ct., April 23, 1997)

EM	CV 97-13	*Richard Mann v. HCN Housing and Public Works* (HCN Tr. Ct., Aug. 18, 1997) **Dismissed**
CS	CV 97-14	*Neil T. McAndrew v. Lisa Miner McAndrew* (HCN Tr. Ct., Feb. 25, 1997)
CS	CV 97-15	*State of Wisconsin v. Charles E. Hopinkah* (HCN Tr. Ct., Feb. 11, 1997)
CS	CV 97-16	*State of Wisconsin v. Joseph White* (HCN Tr. Ct., April 15, 1997)
CS	CV 97-17	*In Re the Interest of Carson Funmaker* (HCN Tr. Ct., April 15, 1997)
CS	CV 97-18	*In the Interest of Brent M. Funmaker* (HCN Tr. Ct., April 9, 1997)
CS	CV 97-19	*Barbara Decorah v. Jones Decorah* (HCN Tr. Ct., April 9, 1997); *modified* (HCN Tr. Ct., Jan. 7, 1998)
CS	CV 97-20	*Tammy Garvin, Consent Decree*, (HCN Tr. Ct., March 17, 1997) **See, CV96-69**
CS	CV 97-21	*Anna Carufel v. Athena I. Goetz* (HCN Tr. Ct., Dec. 30, 1997)
PB	CV 97-22	*In the Matter of the Estate of George Thunder Hindsley* (HCNTr. Ct., April 14, 1997); (HCN Tr. Ct., Oct. 3, 1997)
CS	CV 97-23	*Shawn Blackdeer v. Armand Blackdeer* (HCN Tr. Ct., June 13, 1997)
CS	CV 97-24	*Sara WhiteEagle v. Timothy King* (HCN Tr. Ct., June 17, 1997); *modified* (HCN Tr. Ct., Jan. 9, 1998)
CS	CV 97-25	*Roxanne Johnson v. Loren J. Rave* (HCN Tr. Ct., April 14, 1997); (HCN Tr. Ct., Jan. 16, 1998)
CS	CV 97-26	*Kristina M. Heath v. George O. Stacy* (HCN Tr. Ct., April 3, 1997)
CS	CV 97-27	*Marcella Snowball v. Alfred Snowball, Jr.* (HCN Tr. Ct., April 7, 1997); *suspended* (HCN Tr. Ct., Oct. 14, 1997)
CS	CV 97-28	*Catherine Shegonee v. Daniel Youngthunder* (HCN Tr. Ct., May 7, 1997)
EM	CV 97-29	*Gloria Visintin v. HCN-Office of the President* (HCN Tr. Ct., June 18, 1997); (July 29, 1997) **Settled**
EM	CV97-30	*Eric Lonetree v. Ho-Chunk Casino, et al.* (HCN Tr. Ct., Feb. 11, 1998) **Settled**
EM	CV 97-31	*Roy Littlegeorge v. HCN Gaming Commission*
CS	CV 97-32	*Levi Aaron Lincoln, Sr. v. Louise Marlene Lincoln* (HCN Tr. Ct., May 7, 1997)
CS	CV 97-33	*Karen J. Smith v. Lot L. Smith* (HCN Tr. Ct., April 15, 1997)
CS	CV 97-34	*Charlene Smolenski v. Jeffrey Link* (HCN Tr. Ct., April 9, 1997); *erratum* (HCN Tr. Ct., Jan. 13, 1998)
CS	CV 97-35	*State of Wisconsin v. Arnold J. Crone* (HCN Tr. Ct., April 17, 1997)

CS	CV 97-36	*State of Wisconsin v. Cynthia Smith* (HCN Tr. Ct., March 26, 1997); *erratum* (HCN Tr. Ct., Jan. 22, 1998)
CS	CV 97-37	*State of Wisconsin v. John Goodbear* (HCN Tr. Ct., April 15, 1997)
CS	CV 97-38	*State of Wisconsin v. Barbara Gromoff* (HCN Tr. Ct., April 15, 1997); (HCN Tr. Ct., Jan. 29, 1998)
CS	CV 97-39	*State of Wisconsin v. Zachery Thundercloud* (HCN Tr. Ct., May 20, 1997)
CS	CV 97-40	*State of Wisconsin v. Robert W. Blackdeer* (HCN Tr. Ct., July 11, 1997)
CS	CV 97-41	*State of Wisconsin v. Robert W. Blackdeer* (HCN Tr. Ct., July 7, 1997)
CS	CV 97-42	*Michelle R. DeCora v. John Steindorf* (HCN Tr. Ct., May 5, 1997); *renewed* (HCN Tr. Ct., Feb. 11, 1998)
TR	CV 97-43	*Lionel Cloud v. Ho-Chunk Nation Enrollment* (HCN Tr. Ct., Oct. 30, 1997)
CS	CV 97-44	*State of Wisconsin v. Frederick Greendeer* (HCN Tr. Ct., April 15, 1997); *modified* (HCN Tr. Ct., Jan. 15, 1998)
CS	CV 97-45	*State of Wisconsin v. Betsy Falcon* (HCN Tr. Ct., April 15, 1997); *suspended* (HCN Tr. Ct., June 9, 1997)
CS	CV 97-46	*State of Wisconsin v. Dean Hopinka* (HCN Tr. Ct., April 15, 1997)
CS	CV 97-47	*State of Wisconsin, ex. rel., v. Wayne R. Blackdeer* (HCN Tr. Ct., April 15, 1997); *modified* (HCN Tr. Ct., Jan. 12, 1998)
EM	CV 97-48	*Emmett Walker, Jr. v. HCN et al.* (HCN Tr. Ct., Feb. 11, 1998) **Settled**
EM	CV 97-49	*Gary Snowadzki v. Ho-Chunk Casino* (HCN Tr. Ct., Feb. 11, 1998) **Settled**
EM	CV 97-50	*Martin Henry v. HCN Gaming Commission* (HCN Tr. Ct., July 18, 1997)
CS	CV 97-51	*Millie Smith v. Kevin Smith* (HCN Tr. Ct., May 5, 1997)
GR	CV 97-52	*In the Interest of A.J.C. (d.o.b. 8/30/96) and F.F. (d.o.b. 8/24/89) by Kathy Stacy*
EM	CV 97-53	*Rotanne Price v. Department of Social Services* (HCN Tr. Ct., Aug. 5, 1997) **Settled**
CS	CV 97-54	*Eliza M. Green v. Montgomery James Green* (HCN Tr. Ct., Sept. 17, 1997)
CS	CV 97-55	*Patrick Funmaker, Consent for Entry of Order Claim* (HCN Tr. Ct., May 5, 1997)
CS	CV 97-56	*Larry M. Domenget v. Dolores A. Greendeer* (HCN Tr. Ct., Oct. 15, 1997)
CS	CV 97-57	*State of Wisconsin v. Wallace P. Greendeer* (HCN Tr. Ct., June 24, 1997); *reissued* (HCN Tr. Ct., Oct. 15, 1997)
EM	CV 97-58	*Tammy Temple v. HCN, Ho Chunk Casino et al.* (HCN Tr. Ct., Aug. 14, 1997); (HCN Tr. Ct., Nov. 9, 1997) **Settled**

ER	CV 97-59	*In the Interest of Chauncy P. Wilson by Mary Wilson v. HCN Enrollment* (HCN Tr. Ct., Mar. 3, 1998) **Dismissed**
ER	CV 97-60	*In the Interest of Zachary Mitchell by Celena Mitchell v. HCN Enrollment* (HCN Tr. Ct., Nov. 7, 1997)
CS	CV 97-61	*Casey Whitegull v. Harriet M. Whitegull* (HCN Tr. Ct., May 21, 1997)
EM	CV 97-62	*Delite Woodworth v. Jean Day, Director of Personnel Dept.* (HCN Tr. Ct., Aug. 11, 1997) **Settled**
CS	CV 97-63	*Rosemarie C. Funmaker v. Dennis Funmaker* (HCN Tr. Ct., June 17, 1997)
EL	CV 97-64	*Nettie Kingsley v. HCN Election Board* (HCN Tr. Ct., May 16, 1997)
EL	CV 97-65	*Roberta Greendeer v. HCN Election Board* (HCN Tr. Ct., May 8, 1997)
CS	CV 97-66	*State of Wisconsin v. Tyrone L. DeCorah* (HCN Tr. Ct., June 17, 1997)
CS	CV 97-67	*State of Wisconsin on behalf of Shelley E. Thundercloud v. William J. Greendeer* (HCN Tr. Ct. May 21, 1997); *modified* (HCN Tr. Ct., Oct. 13, 1997)
CS	CV 97-68	*State of Wisconsin v. Morgan K. Decorah* (HCN Tr. Ct., Oct. 19, 1997)
K	CV 97-69	*HCN Home Ownership Program v. Scott Hindes* (HCN Tr. Ct., May 16,1997); (HCN Tr. Ct., Nov. 21, 1997) **Withdrawn**
EM	CV 97-70	*Debra J. Knutson v. HCN Treasury Dept.* (HCN Tr. Ct., Feb. 5, 1998) **Dismissed**
CS	CV 97-71	*Eliza M. Green v. Douglas D. Littlejohn* (HCN Tr. Ct., Nov. 21, 1997) **Dismissed**
PI	CV 97-72	*Steven B. Funmaker v. JoAnn Jones et al.* (HCN Tr. Ct., Nov. 25, 1997) **Dismissed**
CS	CV 97-73	*Agnes Blackhawk v. Barry Blackhawk* (HCN Tr. Ct., June 18, 1997)
CS	CV 97-74	*Cynthia Tack v. Matthew L. Thundercloud* (HCN Tr. Ct., June 17, 1997)
GR	CV 97-75	*In the Interest of David Le Sieur, Dustin Constino, Nicole Halfaday and Dale Halfaday by Madeline Misek* (HCN Tr. Ct., June 10, 1997)
CS	CV 97-76	*State of Wisconsin v. Roberta L. Crowe*, (HCN Tr. Ct., June 17, 1997)
EM	CV 97-77	*Debra Chase-Skenandore v. Ho-Chunk Nation* (HCN Tr. Ct., March 2, 1998) **Settled**
CS	CV 97-78	*Patricia J. Brown v. Phillip J. Long, Jr.* (HCN Tr. Ct., July 15, 1997); *modified* (HCN Tr. Ct., Sept. 23, 1997)
TR	CV 97-79	*In Re Interest of Annette Funmaker* (HCN Tr. Ct., Sept. 11, 1997)
CS	CV 97-80	*Columbia Co. - State of Wisconsin v. Glen Decorah* (HCN Tr. Ct., Aug. 12, 1997)
CS	CV 97-81	*Columbia Co. - State of Wisconsin, and Amanda Fanning v. Derek Fanning* (HCN Tr. Ct., July 15, 1997); (HCN Tr. Ct., Nov. 21, 1997); *erratum* (HCN Tr. Ct., Jan. 13, 1998)

CS	CV 97-82	*In re Rosemarie Powless* (HCN Tr. Ct., Sept. 4, 1997)
CS	CV 97-83	*In re Stuart Taylor* (HCN Tr. Ct., July 15, 1997)
EL	CV 97-84	*James Greendeer v. HCN Election Board, Wade Blackdeer, Kathy Blackdeer , and Tara Walters, et al.* (HCN Tr. Ct., July 7, 1997); (HCN Tr. Ct., Aug. 25, 1997) **Settled**
EM	CV 97-85	*Stephanie Riley v. Leland Whitegull*
CS	CV 97-86	*State of Wisconsin v. Henry Whitethunder* (HCN Tr. Ct., July 15, 1997)
CS	CV 97-87	*State of Wisconsin v. Stanley WhiteEagle* (HCN Tr. Ct., July 15, 1997)
CS	CV 97-88	*Barbara Long v. Garrett Banuelos, Sr.* (HCN Tr. Ct., Sept. 4, 1997); *erratum* (HCN Tr. Ct., Nov. 4, 1997)
GR	CV 97-89	*In the Matter of Guardianship of Dante Ortiz* **Reassigned JV**
CS	CV 97-90	*Judy Diamond v. Roger Allen* (HCN Tr. Ct., Sept. 4, 1997); *denying renewal* (HCN Tr. Ct., Jan. 13, 1998)
CS	CV 97-91	*Michelle Lewis v. Roger Littlegeorge* (HCN Tr. Ct., July 18, 1997)
CS	CV 97-92	*Sara WhiteEagle v. Bernard Crow,* (HCN Tr. Ct., Aug. 6, 1997); *modified* (HCN Tr. Ct., Sept. 9, 1997)
EL	CV 97-93	*Vicki J. Houghton v. HCN Election Board* (HCN Tr. Ct., July 21, 1997)
CS	CV 97-94	*Shawano County, WI on behalf of Jamie Funmaker v. Edward W. Cloud* (HCN Tr. Ct., Sept. 4, 1997); *modified* (HCN Tr. Ct., Oct. 15, 1997)
CS	CV 97-95	*Nicole L. Cook v. Harry J. Cholka* (HCN Tr. Ct., Sept. 4, 1997)
CS	CV 97-96	*State of Wisconsin on behalf of Cynthia Loofboro v. William J. Greendeer* (HCN Tr. Ct., Oct. 13, 1997); *erratum* (HCN Tr. Ct., Jan. 13, 1998)
CS	CV 97-97	*Lisa Rave v. Brent R. St. Cyr* (HCN Tr. Ct., Sept. 4, 1997); *modified* (HCN Tr. Ct., Jan. 12, 1998)
CS	CV 97-98	*Mike Cullen v. Audrey Lewis & Rainbow Casino* (HCN Tr. Ct., July 31, 1997)
CS	CV 97-99	*Connie Smith v. Bradley Smith* (HCN Tr. Ct., Sept. 8, 1997)
CS	CV 97-100	*Karen Goulee v. Jones Decorah* (HCN Tr. Ct., Jan. 7, 1998)
TR	CV 97-101	*In re: Susan Redfearn by William Turner v. HCN Enrollment Dept.* (HCN Tr. Ct., Oct. 10, 1997)
PB	CV 97-102	*In re: Sheri Anne Smith*
CS	CV 97-103	*Anthoney Salerno v. Estelle R. Whitewing* (HCN Tr. Ct., Jan. 6, 1998)
EM	CV 97-104	*Stephanie Riley v. HCN Security Dep't. and Lee Whitegull* (HCN Tr. Ct., Dec. 19, 1997) **Settled**

CS	CV 97-105	*Jocelyn Lopez* (HCN Tr. Ct., Oct. 13, 1997)
EM	CV 97-106	*David A. Modica v. Robert Mudd, Exec. Dir. Of Business and Business Dep't.* (HCN Tr. Ct., Jan. 27, 1998)
CS	CV 97-107	*State of Wisconsin on behalf of Juanita Climer v. Richard Dale Snake* (HCN Tr. Ct., Oct. 15, 1997); *modified* (HCN Tr. Ct., Jan. 16, 1998)
CS	CV 97-108	*State of Wisconsin on behalf of Michael Greengrass v. Richard Dale Snake* (HCN Tr. Ct., Jan. 16, 1998)
CS	CV 97-109	*State of Wisconsin on behalf of Karena Day v. Howard Pettibone* (HCN Tr. Ct., Sept. 29, 1997)
CS	CV 97-110	*State of Wisconsin on behalf of Inez Littlegeorge v. Howard Pettibone* (HCN Tr. Ct., Sept. 26, 1997)
CS	CV 97-111	*State of Wisconsin on behalf of Wayne Falcon v. Cynthia Radtke* (HCN Tr. Ct., Sept. 3, 1997)
CS	CV 97-112	*State of Wisconsin on behalf of Gwyn Greengrass v. Christopher John Littlewolf a.k.a. Greyhair* (HCN Tr. Ct., Aug. 29, 1997)
CS	CV 97-113	*State of Wisconsin on behalf of Shelley Thundercloud v. Kevin Vasquez* (HCN Tr. Ct., Aug. 29, 1997)
CS	CV 97-114	*Elethe Nichols v. Hilton Vasquez* (HCN Tr. Ct., Sept. 26, 1997); *erratum* (HCN Tr. Ct., Oct. 3, 1997)
CS	CV 97-115	*State of Wisconsin on behalf of Laurie Greengrass-Zimmerman v. Robert Cleveland* (HCN Tr. Ct., Sept. 8, 1997)
CS	CV 97-116	*State of Wisconsin on behalf of Debra Lee Hall v. Robert Cleveland* (HCN Tr. Ct., Sept. 8, 1997)
GR	CV 97-117	*In the Interest of Oliver Rockman* (HCN Tr. Ct., Sept. 23, 1997); (HCN Tr. Ct., Nov. 3, 1997)
CS	CV 97-118	*Amy Hennings v. Jerome Cloud* (HCN Tr. Ct., Oct. 8, 1997); (HCN Tr. Ct., Jan. 9, 1998)
D	CV 97-119	*Hocak Fed. Cred. Un. v. Stewart J. Miller* (HCN Tr. Ct., Oct. 2, 1997)
D	CV 97-120	*Hocak Fed. Cred. Un. v. Archie WhiteEagle*
EM	CV 97-121	*John D. Steindorf v. Georgia Lonetree, Exec. Dir. of Social Services* (HCN Tr. Ct., Sept. 19, 1997) **Withdrawn**
CS	CV 97-122	*Joyce Funmaker v. Max P. Funmaker* (HCN Tr. Ct., Oct. 15, 1997)
CS	CV 97-123	*Mary Jo Buttolph v. Charles H. Davis* (HCN Tr. Ct., Oct. 13, 1997); *supplemented* (HCN Tr. Ct., Jan. 16, 1998)

CS	CV 97-124	*Barbara J. Wilson v. Robin E. McKee* (HCN Tr. Ct., Oct. 2, 1997)
CS	CV 97-125	*Verdie Kivimaki v. Virgil Clausen* (HCN Tr. Ct., Oct. 15, 1997)
CS	CV 97-126	*Richard Dakota, Jr. v. Angela B. Wanatee* (HCN Tr. Ct., Jan. 6, 1998)
EM	CV 97-127	*Gary Lonetree, Sr. v. HCN Casino, Dept. of Slots, Exec. Dir. John Holst*
CS	CV 97-128	*State of Wisconsin, Sawyer Co. v. Johnny R. Smith, Sr.* (HCN Tr. Ct., Jan. 13, 1998)
EL	CV 97-129	*Robert A. Mudd v. HCN Election Board* (HCN Tr. Ct., Oct. 3, 1997)
CS	CV 97-130	*Ethel Jeanette Dakota v. Travis Randall Decorah* (HCN Tr. Ct., Oct. 15, 1997)
TR	CV 97-131	*In the Interest of Stuart Taylor, Jr.* (HCN Tr. Ct., Nov. 3, 1997)
CS	CV 97-132	*Sheila Doucette v. Scott Hindes* (HCN Tr. Ct., Oct. 13, 1997); *modified* (HCN Tr. Ct., Jan. 16, 1998)
EM/ CN	CV 97-133	*Diane Lonetree v. Elliott Garvin, Dallas White Wing, Robert Mudd, Gerald Cleveland, Kevin Greengrass, and Robert Funmaker, Jr.* (TRO Denied, HCN Tr. Ct. Sept. 26, 1997)
CS	CV 97-134	*Michelle Haas v. Sanford Decorah* (HCN Tr. Ct., Oct. 13, 1997)
CS	CV 97-135	*Kimberly J. Webb v. Timothy P. King* (HCN Tr. Ct., Jan. 9, 1998)
CS	CV 97-136	*Janelle St. Cyr v. Brent St. Cyr* (HCN Tr. Ct., Jan. 12, 1998)
CS	CV 97-137	*Joseph & Joy Buck v. Kim L. White Wing*
CS	CV 97-138	*Jill Pettibone v. Brent Funmaker* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 97-139	*State of WI, Outagamie County on behalf of Tammy Cook v. Richard Cloud* (HCN Tr. Ct., Nov. 21, 1997)
EL	CV 97-140	*Robert A. Mudd v. HCN Election Board* (HCN Tr. Ct., Oct. 27, 1997)
EM	CV 97-141	*Leigh Stephan, et al. v. HCN*
D	CV 97-142	*Hocak Fed. Cred. Un. v. Debra Crowe & Forest Blackdeer*
EM	CV 97-143	*Daniel Sine v. Jacob Lonetree, as President of HCN*
CS	CV 97-144	*Marilyn E. Conto v. Harry D. Blackhawk* (HCN Tr. Ct., Dec. 31, 1997)
EM	CV 97-145	*Vincent T. Cadotte v. Tris Yellowcloud as Director of Compliance*
D	CV 97-146	*Andrea Gale Storm v. Kirk Anthony Matcha*
D	CV 97-147	*Hocak Fed. Cred. Un. v. Raquel Hernandez and James Ritland*
CS	CV 97-148	*Barb Funmaker v. John Whitewater* (HCN Tr. Ct., Jan. 9, 1998)

CS	CV 97-149	*State of Wisconsin on behalf of Janet Funmaker v. Mahlon Funmaker* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 97-150	*State of Wisconsin on behalf of Brenda Fisher v. Mahlon Funmaker* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 97-151	*State of Wisconsin on behalf of Eileen Link-Funmaker v. Mahlon Funmaker* (HCN Tr. Ct., Jan. 14, 1998)
EM	CV 97-152	*Dan Williams v. Rainbow Casino*
CS	CV 97-153	*State of Wisconsin, Wood County v. Gregory Harrison* (HCN Tr. Ct., Jan. 13, 1998)
EM	CV 97-154	*Dawn Littlejohn v. Michelle R. DeCora*
CS	CV 97-155	*State of Wisconsin on behalf of Eileen Snowball v. Joseph Keenan* (HCN Tr. Ct., Jan. 9, 1998)
CS	CV 97-156	*Naomi Rich v. Wayne Whitman* (HCN Tr. Ct., Jan. 12, 1998)
EM	CV 97-157	*Audrey L. Marzofka v. Rainbow Casino and Godfrey Parazz*
CS	CV 97-158	*State of Wisconsin, Jackson County v. Gregory Harrison* (HCN Tr. Ct., Jan. 13, 1998); (HCN Tr. Ct., Jan. 29, 1998)
D	CV 97-159	*HCN Home Ownership Program v. Scott Hindes*
CS	CV 97-160	*State of Wisconsin v. Gayland Rave, Jr.* (HCN Tr. Ct., Dec. 12, 1997) **Dismissed**
CS	CV 97-161	*State of Wisconsin v. Gayland Rave, Jr.* (HCN Tr. Ct., Dec. 12, 1997) **Dismissed**
CS	CV 97-162	*State of Wisconsin v. Kim Whitegull* (HCN Tr. Ct., Jan. 14, 1998)
CS	CV 97-163	*State of Wisconsin and Sonya M. Bindley v. Jerome Marshall Cloud* (HCN Tr. Ct., Jan. 9, 1998)
CS	CV 97-164	*Rochelle Decorah v. Vincent Cadotte* (HCN Tr. Ct., Jan. 16, 1998)
CS	CV 97-165	*Anne E. W. Johnson v. Timothy G. WhiteEagle* (HCN Tr. Ct., Jan. 15, 1998)
EM	CV 97-166	*Jean Lamb v. Randy Snowball*
EM	CV 97-167	*Jaqueline Nichols v. Randy Snowball*
CS	CV 97-168	*Rachel M. Winneshiek v. James E. Beverly* (HCN Tr. Ct., Feb. 17, 1998)
PI	CV 97-169	*Andrea Storm v. Pearl Lightstorming & Gordon Decorah*
CS	CV 97-170	*State of Wisconsin on behalf of Lana L. Greengrass v. Arlen Benjamin Wamego* (HCN Tr. Ct., Jan. 9, 1998)
CS	CV 97-171	*State of Wisconsin on behalf of Erin L. Emerson v. Rueben A. Rave, Jr.* (HCN Tr. Ct., Jan. 6, 1998)

K	CV 97-172	*Estate of Robert M. Berglin and Lyle R. Berglin & M. Kristine Berglin v. HCN & HCN Casino*

HCN Trial Court Case Breakdown by Subject Matter--1996

Cases Involving Self-Government

Child Support: CV 96-25, CV 96-26, CV 96-29, CV 96-34, CV 96-36, CV 96-37, CV 96-48, CV 96-50, CV 96-51, CV 96-54, CV 96-55, CV 96-56, CV 96-57, CV 96-58, CV 96-61, CV 96-62, CV 96-65, CV 96-66, CV 96-68, CV 96-69, CV 96-70, CV 96-71, CV 96-72, CV 96-73, CV 96-74, CV 96-75, CV 96-79, CV 96-80, CV 96-81, CV 96-82, CV 96-83, CV 96-84, CV 96-85, CV 96-86, CV 96-89, CV 96-90, CV 96-91, CV 96-92, CV 96-93

Enrollment/Membership: CV 96-01, CV 96-30, CV 96-45

Trust Funds: CV 96-27, CV 96-38, CV 96-39, CV 96-41, CV 96-46, CV 96-49, CV 96-60, CV 96-64, CV 96-67, CV 96-76, CV 96-78, CV 96-87

Constitutional: CV 96-21, CV 96-22, CV 96-23, CV 96-24

Probate: CV 96-28

Cases Affecting Non-Indians

Employment: CV 96-02, CV 96-03, **CV 96-04**, **CV 96-05**, **CV 96-07**, **CV 96-08**, **CV 96-09**, CV 96-10, **CV 96-11**, CV 96-12, **CV 96-13**, CV 96-14, CV 96-15, CV 96-16, CV 96-17, **CV 96-18**, CV 96-19, CV 96-20, **CV 96-42**, **CV 96-43**, CV 96-52, **CV 96-53**, **CV 96-77**, CV 96-88, **CV 96-94**

Gaming Commission: CV 96-33, **CV 96-59**

Contract/Debt: **CV 96-06**, CV 96-31, **CV 96-32**, CV 96-35, **CV 96-44**, CV 96-47, **CV 96-63**

Tort: **CV 96-40**

(**Redline** indicates case affecting Non-Indian interests)

HCN Trial Court Case Breakdown by Subject Matter--1997

Cases Involving Self-Government

Child Support: CV 97-01, CV 97-02, CV 97-04, CV 97-06, CV 97-07, CV 97-08, CV 97-09, CV 97-10, CV 97-11, CV 97-14, CV 97-15, CV 97-16, CV 97-17, CV 97-18, CV 97-19, CV 97-20, CV 97-21, CV 97-23, CV 97-24, CV 97-25, CV 97-26, CV 97-27, CV 97-28, CV 97-32, CV 97-33, CV 97-34, CV 97-35, CV 97-36, CV 97-37, CV 97-38, CV 97-39, CV 97-40, CV 97-41, CV 97-42, CV 97-44, CV 97-45, CV 97-46, CV 97-47, CV 97-51, CV 97-54, CV 97-55, CV 97-56, CV 97-57, CV 97-61, CV 97-63, CV 97-66, CV 97-67, CV 97-68, CV 97-71, CV 97-73, CV 97-74, CV 97-76, CV 97-78, CV 97-80, CV 97-81, CV 97-82, CV 97-83, CV 97-86, CV 97-87, CV 97-88, CV 97-90, CV 97-91, CV 97-92, CV 97-94, CV 97-95, CV 97-96, CV 97-97, CV 97-98, CV 97-99, CV 97-100, CV 97-103, CV 97-105, CV 97-107, CV 97-108, CV 97-109, CV 97-110, CV 97-111, CV 97-112, CV 97-113, CV 97-114, CV 97-115, CV 97-116, CV 97-118, CV 97-122, CV 97-123, CV 97-124, CV 97-125, CV 97-126, CV 97-128, CV 97-130, CV 97-132, CV 97-134, CV 97-135, CV 97-136, CV 97-137, CV 97-138, CV 97-139, CV 97-144, CV 97-148, CV 97-149, CV 97-150, CV 97-151, CV 97-153, CV 97-155, CV 97-156, CV 97-158, CV 97-160, CV 97-161, CV 97-162, CV 97-163, CV 97-164, CV 97-165, CV 97-168, CV 97-170, CV 97-171

Enrollment/Membership: CV 97-59, CV 97-60

Election Challenges: CV 97-64, CV 97-65, CV 97-84, CV 97-93, CV 97-129, CV 97-140

Trust Funds: CV 97-03, CV 97-43, CV 97-52, CV 97-75, CV 97-79, CV 97-89, CV 97-101, CV 97-117, CV 97-131

Constitutional: CV 97-12, CV 97-133

Probate: CV 97-22, CV 97-102

Cases Affecting Non-Indians

Employment: CV 97-13, CV 97-29, CV 97-30, CV 97-31, CV 97-48, **CV 97-49**, CV 97-50, **CV 97-53**, **CV 97-58**, **CV 97-62**, **CV 97-70**, **CV 97-77**, **CV 97-85**, **CV 97-104**, CV 97-106, CV 97-121, CV 97-127, **CV 97-141**, CV 97-143, CV 97-145, **CV 97-152**, CV 97-154, **CV 97-157**, **CV 97-166**, **CV 97-167**

Contract/Debt: CV 97-05, CV 97-69, CV 97-119, CV 97-120, CV 97-142, CV 97-146, **CV 97-147**, CV 97-159, CV 97-172

Tort: CV 97-72, CV 97-169

(**Redline** indicates case affecting Non-Indian interests)

APPENDIX B

HCN Approved Amended and Restated Per Capita Distribution Ordinance

HCN Claims Against Per Capita Ordinance

HCN Recognition of Foreign Child Support Orders Ordinance

HO-CHUNK NATION LEGISLATURE
Governing Body of the Ho-Chunk Nation

JUL 1997
RECEIVED

MEMORANDUM

July 21, 1997

TO: **Legislature**
Office of the President
Ho-Chunk Nation Court System
Department of Justice
Department of Treasury
Enrollment
Legislative Counsel
Legislative Attorney

FROM: **Vicki Shisler, Legislative Secretary**

RE: **APPROVED AMENDED AND RESTATED PER CAPITA DISTRIBUTION ORDINANCE**

Attached is a copy of the latest approved Amended and Restated Per Capita Distribution Ordinance approved by the Bureau of Indian Affairs. This version was approved by the Ho-Chunk Nation Legislature on July 1, 1997 and affects Section 4.01. Section 4.01 relates to the provision on Allocation of Tribal Gaming Revenues. Also attached is a copy of Resolution No. 07/01/97A and the letter dated July 18, 1997 from the Bureau of Indian Affairs.

Please distribute copies of these documents to interested parties or individuals. Thank you for your attention in this matter.

Executive Offices
W9814 Airport Road P.O. Box 667 Black River Falls, WI 54615
(715) 284-9343 FAX (715) 284-9172

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

MINNEAPOLIS AREA OFFICE
331 SOUTH 2ND AVENUE
MINNEAPOLIS, MINNESOTA 55401-2241

IN REPLY REFER TO:
Tribal Operations

JUL 18 1997

Jacob Lonetree, President
Ho-Chunk Nation, Office of the President
W9814 Airport Road
Post Office Box 667
Black River Falls, Wisconsin 54615

Dear Mr. Lonetree:

On July 7, 1997, we received an original copy of the Ho-Chunk Nation Amended and Restated Per Capita Distribution Ordinance and an original certified copy of Ho-Chunk Nation Legislature Resolution No. 07/01/97A. Since the resolution amends the Per Capita Distribution Ordinance for the distribution of gaming revenue to tribal members, Secretarial approval is required by the terms of the Indian Gaming Regulatory Act. We have completed our review.

It is our determination that the amendment is in compliance with the Indian Gaming Regulatory Act and the December 21, 1992, Guidelines to Govern the Review and Approval of Per Capita Payments. Therefore, pursuant to 25 U.S.C. § 2710(b)(3)(B) and the authority delegated to the Area Director by 10 BIAM 3 and Addendum 10-3, the *Ho-Chunk Nation Amended and Restated Per Capita Distribution Ordinance* (authorized by Resolution No. 07/01/97A) is hereby approved.

If you have any questions regarding this matter, please contact Tim LaPointe, Tribal Operations Specialist, at (612) 373-1000, ext. 1125.

Sincerely,

Stewart A. Stone

Acting Area Director

cc: Superintendent, Great Lakes Agency
Laura Soap, Legislative Attorney



HO-CHUNK NATION LEGISLATURE
Governing Body of the Ho-Chunk Nation

Ho-Chunk Nation Legislature
Resolution No. 07/01/97A

Ho-Chunk Nation Amended and Restated Per Capita Distribution Ordinance

WHEREAS, on November 1, 1994, the Secretary of the Interior approved a new Constitution for the Ho-Chunk Nation, formerly known as the Wisconsin Winnebago Nation, and

WHEREAS, Article V, Section 1, paragraph (a) of the Constitution of the Ho-Chunk Nation provides that the legislative powers of the Nation shall be vested in the Legislature, and

WHEREAS, the Legislature of the Ho-Chunk Nation is the duly constituted governing body of the Ho-Chunk Nation organized and established pursuant to the Indian Reorganization Act of 1934, and given certain powers pursuant to the Constitution of the Ho-Chunk Nation, and

WHEREAS, Article V, Section 2(a) of the Constitution of the Ho-Chunk Nation empowers the Legislature to make laws, including codes, ordinances, resolutions, and statutes, and

WHEREAS, Article V, Section 2(d) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to make certain expenditures and to appropriate funds to the various Departments in an annual budget, and

WHEREAS, Article V, Section 2(l) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to enact laws which deal with the Nation's assets, and

WHEREAS, the Ho-Chunk Nation engages in gaming on its tribal lands and gains revenues therefrom which are used to fund tribal government operations and programs, to provide for the general welfare of the Tribe and its members, to promote economic development, and to donate to local government agencies, and

WHEREAS, pursuant to the Indian Gaming Regulatory Act, Pub. L. 100-497, 25 U.S.C. s.2710(b)(3), net revenues from any gaming activity conducted by an Indian Tribe

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Executive Offices
W9814 Airport Road P.O. Box 667 Black River Falls, WI 54615
(715) 284-9343 FAX (715) 284-3172 (800) 294-9343

may be used to make per capita payments to members of the Indian tribe if the Tribe has prepared a plan to allocate revenues gained from gaming and said plan is approved by the Secretary, the per capita interests of minors and incompetents are protected, and notice of federal tax liability for per capita payments is given to recipients, and

WHEREAS, the Ho-Chunk Nation Per Capita Distribution Ordinance protects minors and incompetents interests in per capita payments, and sets forth a revenue allocation plan for tribal revenues derived from the Nation's gaming operations in accordance with the Indian Gaming Regulatory Act;

WHEREAS, there is a need to amend and restate certain provisions of the Ho-Chunk Nation Amended Per Capita Distribution Ordinance approved by the Secretary on March 28, 1997 because of the Ho-Chunk Nation Legislature has completed its Fiscal Year 1997-1998 planning; and

NOW THEREFORE BE IT RESOLVED that the Ho-Chunk Nation Legislature adopts the following Amended and Restated Per Capita Distribution Ordinance with changes primarily affecting Section 4.01(a) and all prior inconsistent legislation is hereby repealed, and the Ordinance hereby adopted is submitted to the Bureau of Indian Affairs for approval.

CERTIFICATION

I, the undersigned, as Secretary of the Ho-Chunk Nation, hereby certify that the Ho-Chunk Nation Legislature composed of 10 members, of whom 10 constituting a quorum, were present at the meeting duly called and convened on July 01, 1997, and the foregoing resolution was duly adopted at said meeting by an affirmative vote of 10 members, 0 opposed, 0 abstaining, pursuant to authority of Article V, Section 2(a) and (x) of the Constitution of the Ho-Chunk Nation approved by the Secretary of the Interior on November 1, 1994, and that said resolution has not been rescinded or amended in any way. I further certify that this is a verified copy of said resolution.

Vicki Shisler, Legislative Secretary — Date: July 1, 1997

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Ho-Chunk Nation Amended and Restated Per Capita Distribution Ordinance

I. POLICY

Section 1.01 Statement of Policy

In order to promote the general welfare of the Nation and its members, this Ordinance is intended to provide for fair and equitable per capita distribution to duly enrolled tribal members of revenues appropriated by the Ho-Chunk Nation Legislature from gaming activities conducted by and on behalf of the Nation. This Ordinance combines both the per capita plan and the revenue allocation plan of the Nation.

II. GENERAL PROVISIONS

Section 2.01 Definitions.

For purposes of this Ordinance:

(a) "Act" means the Indian Gaming Regulatory Act, Pub. L. 100–497, 25 U.S.C.§ 2701 et seq.

(b) " Children's Trust Funds" or "CTFs" shall mean the trust funds established under Section 5 for all minor Members and legally incompetent adult Members eligible to receive per capita payments.

(c) "Members" means those living individuals on the date set forth for per capita distribution, including otherwise eligible minor children and other legal incompetents, who are duly recognized as members of the Ho-Chunk Nation.

(d) "Net revenues" means gross revenues of tribal gaming activities less amounts paid out as, or paid for, prizes and total operating expenses including debt service.

(e) "Ordinance" means this Per Capita Distribution Ordinance.

(f) "Revenue Allocation Plan" means the revenue allocation plan included in Section 3 of this Ordinance providing a percentage allocation of uses of funds derived from tribal gaming operations.

(g) "State" means the State of Wisconsin.

III. APPROPRIATIONS FOR PER CAPITA DISTRIBUTION

Section 3.01 Appropriations and Application of Tribal Gaming Revenues.

In order to provide for the general welfare of the Nation and its members, the Ho-Chunk Nation Legislature shall review the income, expenses and management of tribal gaming operations not less than 15 nor more than 30 days prior to the per capita distribution date described in Section 7.01 and after due consideration of the need to fund tribal government operations and programs, the overall needs of the Nation and its members, and the need to promote tribal economic development, shall decide whether to make any changes to the Revenue Allocation Plan providing for appropriate percentage allocation of Tribal Gaming Revenues within the annual budget of the Nation. At that time, the Ho-Chunk Nation Legislature shall also determine what amount, if any, of the revenues allocated to general welfare purposes shall be appropriated for distribution as per capita payments on the dates specified in Section 7.01. An affirmative vote of at least a majority of the members of the Ho-Chunk Nation Legislature shall be required to approve any changes to the Revenue Allocation Plan or to authorize per capita appropriations.

IV. ALLOCATION OF TRIBAL GAMING REVENUES

Section 4.01 Allocation of Tribal Gaming Revenues.

(a) The allocation of Tribal Gaming Revenues shall be as follows: 16.27% (SIXTEEN AND 27/100ths PERCENT) for tribal government operations and programs; 52.26% (FIFTY-TWO AND 26/100ths PERCENT to provide for the general welfare of the Nation or its members; 25.55% (TWENTY-FIVE AND 55/100ths PERCENT) to promote tribal economic development; 0.20% (ZERO AND 20/100ths PERCENT) for charitable donations; and 5.72% (FIVE AND 72/100ths PERCENT) to fund the operation of local government services.

(b) The portion allocated to Tribal Government Operations and Programs shall fund: the Ho-Chunk Nation Legislature activities, Executive Offices, Treasury Department, Computer System, Personnel Department, Property and Procurement, Newsletter, Department of Justice, Legal Fees, Investigation and Audits, Tribal Courts, Constitutional Projects, and other similar governmental executive and administrative services to which the Legislature may appropriate funds from time to time.

(c) The portion allocated to the General Welfare of the Nation and its Members shall fund Education Administration, Tribal Scholarships, Community Education Support,

Headstart Support and buildings, employee assistance, training, TERO Commission, Public Works Department, new homes and mobile homes, repairs and maintenance, Health Department, Tribal Aging Unit, other similar governmental operating services to which the Legislature may appropriate funds from time to time, and per capita payments .

(d) The portion allocated to Economic Development shall fund; the Planning Department, Development Department, Business Loans, land acquisitions, purchase of businesses, Enterprise Management, Casino Department Service, casino expansion, and other similar business and proprietary services to which the Legislature may appropriate funds from time to time.

(e) The charitable donations will be decided by the Ho-Chunk Nation Legislature or designee based on requests.

(f) Funding for the operation of local government services will be coordinated by the Ho-Chunk Nation Legislature or designee.

V. MEMBERSHIP AND ELIGIBILITY FOR PER CAPITA DISTRIBUTION

Section 5.01 Applications, Written Determination of Eligibility

(a) All members of the Ho-Chunk Nation that are on the tribal rolls shall be eligible to receive per capita distributions. Such distribution shall be made in an equal amount of money to each tribal member eligible to receive a per capita distribution pursuant to this Ordinance.

(b) Membership in the Ho-Chunk Nation shall be determined in accordance with the Tribal Enrollment and Membership Act. The rights of a person to appeal an adverse determination on his or her membership application shall be determined under the Tribal Enrollment and Membership Act.

(c) In order to provide for the orderly review and consideration, applications approved within 60 (SIXTY) days or less of a scheduled distribution date shall not be found eligible for distribution until the next scheduled distribution. At least 45 (FORTY-FIVE) days but no longer than 50 (FIFTY) days before the quarterly date of the distribution of per capita payments as provided in Section 6 of this Ordinance, the Enrollment Officer shall publish a list of those persons found eligible for such payments. Any applicant found not to be eligible shall be provided with a written determination of the basis for the denial.

VI. MINORS AND OTHER LEGAL INCOMPETENTS; GUARDIANS

Section 6.01 Minors and other legal incompetents

(a) The interests of minors and other legally incompetent Members, otherwise entitled to receive per capita payments, shall in lieu of payment to such minor or incompetent Member, be disbursed to a Children's Trust Fund which shall be established for each such member. The Ho-Chunk Nation shall establish a formal irrevocable legal structure for such CTFs approved by the Nation's Legislature as soon after passage of this Ordinance as shall be practicable, with any amounts currently held by the Nation for passage for the benefit of minor and legally incompetent Members, and all additions thereto pending approval and establishment of such formal irrevocable structure, to be held in an account for the benefit of each such Member-beneficiary under the supervision of the Trial Court of the Nation. Trust assets of such CTFs shall be invested in a reasonable and prudent manner which protects the principal and seeks a reasonable return. The trust assets of each such account maintained for a minor shall be disbursed to the Member-beneficiary thereof upon reaching the age of eighteen (18); provided that, this provision shall not operate to compel disbursement of funds to Members legally determined to be incompetent.

(b) Funds in the CTF of a minor or legally incompetent member may be available for the benefit of a beneficiary's health, education and welfare when the needs of such person are not being met from other Tribal funds or other state or federal public entitlement program, and upon a finding of special need by the Ho-Chunk Nation Trial Court. In order to request such funds; (1) a written request must be submitted to the Nation's Trial Court by the beneficiary's parent or legal guardian detailing the purpose and needs for such funds, and; (2) the parent or legal guardian shall maintain records and account to the Trial Court in sufficient detail to demonstrate that the funds disbursed were expended as required by this Ordinance and any applicable federal law, and; (3) any other standards, procedures and conditions that may be subsequently adopted by the Legislature consistent with any applicable federal law shall be met.

VII. PAYMENTS

Section 7.01 Payments

Any per capita payments authorized by the Ho-Chunk Nation Legislature pursuant to Section 3 shall be made quarterly on the first day of the months of November, February, May and August and mailed on the last working day of the months of October, January, April, and July, to all Members eligible for the distribution on

accordance with Section 4, and in proportionate shares to the CTFs on behalf of the beneficiaries thereof.

VIII. TAXATION

Section 8.01 Taxation

The per capita payments are subject to Federal taxation. Members receiving payments shall be informed that they are responsible for payment of applicable taxes. The Nation shall deduct and withhold tax from per capita payments to the extent and in the amounts required by 26 USCS sec. 3402(r) or any successor statute. In addition, the Nation may, in its discretion, withhold such greater amount of tax from Per Capita payments to a Member as such Member may voluntarily request.

IX. AMENDMENTS

Section 9.01 Amendments

This Ordinance may be amended by the action of the Ho-Chunk Legislature, in a meeting at which a quorum is present, but only upon the affirmative vote of a majority of the members present. All amendments shall be subject to the approval of the Secretary of the Interior before they become effective.

Legislative History:

Approved by the Legislature on 10/17/95.
Amended by Elections, Constitutional Law and Judiciary Committee on 1/19/96 affecting Section 5.
Legislature adopts amendments affecting Section 5 on 1/30/96. BIA approval granted 7/26/96.
Amendments considered and referred to the Legislature by the Administrative Rules/Elections Committee on September 26, 1996.
Legislature adopts amendments on 10/04/96. BIA approval granted 10/25/96
Legislature adopts amendments affecting sec. 4.01(a) on 03/11/97. BIA approval granted 03/28/97.
Legislature adopts amendment affecting sec. 4.01(a) on 07/01/97. BIA approval granted on 07/18/97.



HO-CHUNK NATION LEGISLATURE
Governing Body of the Ho-Chunk Nation

MEMORANDUM

To: Legislature
President Chloris A. Lowe, Jr.
Ho-Chunk Nation Court System
Department of Justice
Department of Treasury
Department of Personnel
Gaming Commission
Department of Business

From: John Espinosa, Legislative Counsel

Date: September 9, 1996

Re: Claims Against Per Capita Ordinance

Attached, please find the Ho-Chunk Nation Claims Against Per Capita Ordinance, which was adopted by the Legislature on September 6, 1996. Basically, this Ordinance allows the Nation's courts to enforce claims against per capita distributions only for federal tax levies, child support orders, and money owed to the Nation by a member. Should you have any questions, please contact either the Dept. of Justice, the Ho-Chunk Nation Court System, or my office.

Executive Offices
W9814 Airport Road P.O. Box 667 Black River Falls WI 54615

CLAIMS AGAINST PER CAPITA ORDINANCE

Sec. 101. Definitions.

For purposes of this Ordinance:

(a) "Nation" means the Ho-Chunk Nation

(b) "Per Capita Distribution" means a distribution made by the Nation to its members on an equal per capita basis pursuant to its Per Capita Distribution Ordinance then in effect, and in accordance with Section 11 (b) (3) of the Indian Gaming Regulatory Act, 25 U.S.C. Sec 2710 (b) (3), or any successor statute, or any other distribution of Tribal assets or earnings on a per capita basis to members.

(c) "Per Capita Share" means each member's equal pro rata share of a Per Capita Distribution, without reduction for any withholding, garnishment or levy permitted by this Ordinance, but after withholding at the source required by federal income tax law.

(d) "Payment" of a Per Capita Share means the time at which preparation of checks and all preparatory activity concerning a Per Capita Distribution is complete and checks for some or all Per Capita Shares, other than those which may be affected by claims permitted hereunder, are placed in the U.S. Mail or delivered to another independent delivery service.

(e) "Tribal Member" means a person duly enrolled as a member of the Nation in accordance with the Constitution and laws of the Nation.

Sec. 102. Character of Per Capita Distributions / No Right To Compel.

Per Capita Distributions shall be made, when and as determined or declared in accordance with the Per Capita Distribution Ordinance and any and all other applicable laws of the Nation, out of the assets and earnings of the Nation, and such assets and earnings shall retain their character as property of the Nation until Payment of Per Capita Shares is actually made therefrom. No Tribal Member, nor any person claiming any right derived from a Tribal Member, including creditors of a Tribal Member, shall be entitled to compel the making of any Per Capita Distribution prior to the time of Payment thereof, and the making of each Per Capita Distribution, and the amount and timing thereof, shall at all times prior to Payment be subject to elimination or modification pursuant to any amendment to the then effective Per Capita Distribution Ordinance adopted in accordance with the Constitution and laws of the Nation; provided that nothing contained herein shall preclude an action in the Trial Court of the Nation seeking to require any official or body of the Nation to perform any

administrative or ministerial duty required of him, her or them under the then effective Per Capita Distribution Ordinance. No Tribal Member, nor any person claiming any right derived from a Tribal member, including creditors of a Tribal Member, shall have any right, title, interest or entitlement in any Per Capita Share unless and until Payment of the Per Capita Distribution to which it relates occurs, and any right, title interest and /or entitlement accruing at Payment shall be subject to Section 103 hereof.

Sec. 103 **Permitted Claims Against Per Capita Shares.**

The following claims shall be recognized and enforced by the Nation against a Per Capita Share at the time of Payment of the Per Capita Distribution of which it is a part, and prior to the distribution of such Per Capita Share to a Tribal Member:

(a) Any debt or monetary obligation then due and owing by the Tribal Member to the Nation, whether by acceleration or otherwise, which (i) has been established by a judgement of the Trial Court of the Nation and which is subject to an order of the Trial Court permitting recovery from such Tribal Member's er Capita Share, or (ii) is stated in writing signed by the Tribal Member and which the Tribal Member has agreed in writing may be recovered from his Per Capita Share upon delinquency, default or other event;

(b) Any order of garnishment issued by the Trial Court for purposes of child support pursuant to the Recognition of Foreign Child Support Orders Ordinance, Children's Code or other applicable law of the Nation; and

(c) Any federal income tax levy issued against the income or property of the Tribal Member held by the Nation.

In the event that multiple claims described above are made against the same Per Capita Share: (i) federal tax levies described in (c) shall have the first priority, except to the extent they allow prior payment of child support, (ii) child support payable under (b) shall have the next priority, and (iii) recovery of debts and obligations to the Nation shall have the lowest priority; provided that nothing in this Ordinance shall restrict the Nation from obtaining security for and enforcing the debts of Tribal Members to the Nation through mortgages, liens, foreclosure, attached and other remedies.

Sec. 104. **No Other Claims.**

Except as specifically provided in Section 103, the Nation shall not recognize or enforce any claim, garnishment, levy, attachment, assignment or other right or interest in a Per Capita Share. The Nation shall pay the full amount of the Per Capita Share, less any claim recognized under Section 103, to the Tribal Member whose interest in the Per Capita Distribution is represented thereby at the time of Payment, unless the Per Capita Distribution Ordinance shall otherwise require the payment

of such Tribal Member's Per Capita Share to a trustee or other fiduciary pursuant to an arrangement established to protect such Tribal Member's interests.

Legislative History:

Referred to the full Legislature on July 12, 1996 by the Health & Social Services Committee
Referred to the Health & Social Services Committee for further review by the full Legislature on July 16, 1996
Adopted by the Ho-Chunk Nation Legislature on September 6, 1996



HO-CHUNK NATION LEGISLATURE
Governing Body of the Ho-Chunk Nation

MEMORANDUM

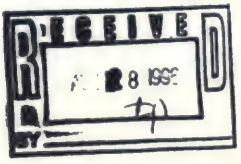
To: Ho-Chunk Nation Legislature
President Chloris A. Lowe, Jr.
Ho-Chunk Nation Court System
Deparment of Justice
Department of Treasury
Department of Personnel
Ho-Chunk Wo-Lduk

From: John Espinosa, Legislative Counsel

Date: August 27, 1996

Re: Recognition of Foreign Child Support Orders Ordinance

Attached you will find the Recognition of Foreign Child Support Orders Ordinance which was adopted by the Ho-Chunk Nation Legislature on August 20, 1996. Please be sure to disseminate a copy to all interested parties. Should you have any questions, please feel free to contact either myself or the Department of Justice.



082796.3

RECOGNITION OF FOREIGN CHILD SUPPORT ORDERS ORDINANCE

Section 101. General Rule Definitions.

(a) In the interest of the Nation and out of respect for other jurisdictions, the Ho-Chunk Nation shall enforce a child support order of another tribe, a state or other foreign jurisdiction, if presented and determined enforceable under this Chapter.

(b) For purposes of this Ordinance:

(i) "Nation" means the Ho-Chunk Nation.

(ii) "Per Capita Payment" means a distribution from the Nation to a member pursuant to the Nation's Per Capita Distribution Ordinance then in effect, and in accordance with Section 11(b)(3) of the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2710(b)(3), or any successor statute, or any other distribution of the Nation's assets or earnings on a Per Capita basis to members.

(iii) "Petition" means a petition and motion to register and enforce a child support order of another jurisdiction under this Ordinance.

(iv) "Trial Court" means the Ho-Chunk Nation Trial Court.

Section 102. Motion.

Any person or other tribe, state, or foreign jurisdiction that wishes to enforce a child support order against Per Capita Payments or wages, compensation or other payments from the Nation must apply to the Trial Court by filing a Petition to register and enforce a foreign child support order. The Petition shall be accompanied by an authenticated copy of the child support order.

Section 103. Substance of Foreign Child Support Order.

The foreign child support order shall recite or be accompanied by documentation showing the jurisdiction of the foreign court or administrative agency, the authority for entering the order, the name of the person subject to the order and his/her relationship to the child and the amount of child support.

Section 104. Service of Process.

The defendant shall be served with a copy of the Petition and child support order. Service shall be made in any manner permitted for service of process commencing an action in the Trial Court under the Ho-Chunk Nation Rules of Civil Procedure.

Section 105. Hearing.

Within twenty (20) days after service of the Petition, the defendant may request a formal hearing regarding the foreign child support order. The hearing shall not review the merits of the child support order, and shall be limited to issues regarding:

(a) whether the foreign court or administrative agency had jurisdiction to enter the child support order;

(b) whether defendant had due process including proper notice and a fair hearing;

(c) whether collusion, fraud or clear mistakes of law or fact are present;

(d) whether there is a conflict with any state or federal law;

(e) whether there is a conflict with the Nation's law or public policy.

Section 106. Judgment.

A judgment shall be considered complete and deemed entered when it is signed by the judge and filed by the clerk.

(a) A judgment shall either enforce the child support order and grant child support payments, or dismiss the motion on one or more of the grounds set forth in Section 105 of this Chapter.

(b) Except as otherwise provided in this Chapter, a judgment shall not allow any modification from the foreign child support order or otherwise change the percentage, agreed amount, or amount if in arrears of child support to be awarded.

Section 107. Default Judgment.

If the defendant fails to respond within twenty (20) days to the child support Petition, the Trial Court may enter a default judgment granting the relief sought in the Petition.

Section 108. Enforcement.

The Trial Court may enforce the judgment for child support through an order garnishing the defendant's wages, compensation or other payments owing from the Nation, and any of its enterprises, programs and projects other than Per Capita Payments, and may enforce such order against Per Capita Payments to defendant under Section 109.

Section 109. Enforcement Against Per Capita Payments.

Each judgment entered by the Trial Court for child support under this Chapter shall, unless ordered otherwise by the Trial Court based upon its construction of the foreign order, and upon receipt by the Treasury and Enrollment Departments of the Nation, constitute a lien upon and assignment of defendant's Per Capita Payments under the then effective Ho-Chunk Nation Per Capita Ordinance; provided that (a) judgment received within fifteen (15) days of a Per Capita Payment shall not be effective for that payment but shall be effective for all subsequent payments.

(a) An order of the Trial Court placing a lien upon and assigning defendant's per capita for child support under this Chapter shall be immediately directed to the Enrollment and Treasury Departments of the Ho-Chunk Nation.

(1) Except as provided in paragraph (b), the Treasury Department must withhold the specified amount from debtor-parent's per capita check and transmit such finds directly to the clerk or designee of the Trial Court.

(2) The clerk of the Trial Court shall remit the payments to claimant if payment is transmitted to the clerk of the Trial Court instead of a designee.

(b) The maximum amount in any one per capita check subject to withholding under this Chapter is thirty-four percent (34%). In addition, if the debtor-parent is then in arrears in his or her child support obligation, the Trial Court may direct the withholding of an additional amount not to exceed twenty-six percent (26%) of such original per capita check.

Section 110. Termination.

Debtor-parent's obligation to pay child support shall lapse when the judgment is satisfied.

Legislative History:

Referred to the full Legislature on July 12, 1996 by the Health & Social Services Committee
Referred to the Health & Social Services Committee for further review by the full Legislature on July 16, 1996
Referred to the full Legislature on August 13, 1996 by telephone poll of the Health & Social Services Committee
Adopted by the Ho-Chunk Nation Legislature on August 20, 1996

APPENDIX C

HCN Trial Court Child Support Enforcement Case & Disposition Table

1996-1997

PER CAPITA		FEBRUARY 1997			May-97			Aug-97			Nov-97			Feb-98		
Case No	Name	Current	Arrears	Total	Current	Arrears	Total	Current	Arrears	Total	Current	Arrears	Total	Current	Arrears	Total
CV-97-90											358.18					
CV-97-88											634.56	547.80		634.56	548.85	1183.41
CV-97-10					375.36			357.17			358.18			358.86		358.86
CV-96-72			1104.00			1104.00			1050.50			1053.47			667.29	667.29
CV-97-40								252.12	75.00		252.83	75.00		253.32	75	328.32
CV-97-41								225.02	295.00		225.65			226.08		226.08
CV-97-47					664.48	574.08		651.31	546.26		653.12	547.78		663	548.85	1211.85
CV97-144														527.74	548.85	1076.59
CV-96-26		690.00	574.08		690.00	574.08		690.00	546.26		690.00	547.80		690.00	548.85	1238.85
CV-96-25			441.60		552.00	441.60		525.25	420.20		526.73	421.39		358.86	422.19	781.05
CV97-164														358.86		358.86
CV-97-09						660.00										
CV-97-95											585	547.8		585	548.85	1133.85
CV97-125											611.01	547.8		612.18	548.85	1161.03
CV97-115												273.9			274.42	274.42
CV97-116												273.9			274.42	274.42
CV-96-91					375.36	574.08		357.17	546.26		358.18	547.8		358.86	548.85	907.71
CV-96-73		375.36	574.08		375.36	574.08		357.17	410.50		358.18			358.86		358.86
94cu21														358.86		358.86
CV97-94											358.18	547.8		358.86	548.85	907.71
CV-96-84					552.00	552.00		525.25	525.25		526.73	414.79		527.74		527.74
JV96-15/19											716.36			717.73		717.73
CV97-118											358.18			358.86		358.86
CV97-163														358.86	189.99	548.85
CV-97-08					375.36	335.73		357.17			358.18			358.86		358.86
CV97-139														358.86	261	619.86
CV-97-35					640.32	359.27		609.29			611.01			612.18		612.18
CV-96-54		640.32	574.08		640.32	574.08		609.29	392.16		611.01	75		612.18	75	687.18
CV97-92											105.35	471.95		105.55	472.86	578.41
CV-97-76								525.25	546.26		526.73	547.8		527.74	548.85	1076.59
CV97-123											340	150		340	150	490
CV-96-57		419.52			419.52			525.25			526.73			527.74		527.74
CV-97-06		242.88			242.88			231.11			231.76			232.21		232.21
CV-96-65						276			262.62			273.9		274.42		274.42
CV96-83		276	287.04		574.08	276		273.13	262.62		263.37	273.9		263.87	274.42	538.29
CV97-80														612.18	548.85	1161.03
CV-96-66		309.12	574.08		309.12	574.08		294.14	546.26		294.97	273.9		295.53	181.54	477.07
CV-97-19					375.36			357.17	273.13		358.18	273.9		358.86	274.42	633.28
CV97-100														181.54		181.54
CV-96-89					750.72	574.08		714.34	546.26		716.36	547.8		717.73	548.85	1266.58
CV-97-68											358.18	547.8		358.86		358.86
CV97-134											120	357.17		358.86	120	478.86
cCV97-130											693	547.8		693	548.85	1241.85
CV-97-66								462.22	546.26		463.52	547.8		464.41	548.85	1013.26
CV-97-45					375.36			0	0							

| | | |

JV96-12			200			200.00			200			200			443.3			443.3	
CV-97-14						750.72	574.08		714.34	546.26		716.36	390.74		717.73			717.73	
CV-96-85						574.08			546.26			193.42							
CV97-124												294.97			295.53			295.53	
CV-96-68				574.08		574.08			546.26			547.8			540	548.85		1088.85	
CV97-109												120	210.69		120	211.1		331.1	
CV97-110												358.16	210.69		358.86	211.1		569.96	
CV-96-93						750.72	50.00		714.34	50.00		716.36	50		717.73	50		767.73	
CV97-82												611.01			612.18			612.18	
94-CU-06						225.00			225.00			225							
JV-96-06						450.00			450.00										
CV97-111												526.73			527.74			527.74	
CV-97-25						463.68	375.36		441.21	367.17		442.46	358.16		443.3	358.86		802.16	
CV97-25						287.04	196.72		273.13	189.09		273.9	189.82		274.42	189.99		464.41	
CV-96-37			750.72			0	0		0	0									
CV97-17															637			637	
CV-96-36			750.72	574.08		750.72	574.08		714.34	546.26		716.36	547.8		716.36	548.85		1265.21	
CV-96-51			552.00	574.08		552.00	178.44		525.25			526.73			527.74			527.74	
CV97-99												526.73			527.74			527.74	
CV97-128															358.86			358.86	
CV-97-51									609.29			611.01			612.18			512.18	
CV-97-33						552.00			525.25			526.73			527.74			527.74	
CV-96-79			640.32			640.32			609.29			611.01			612.18			612.18	
CV-96-51			375.36	574.08		375.36	570.75		357.17			358.16			375	488.64		863.64	
CV97-107													547.8			274.42		274.42	
CV97-108																274.42		274.42	
CV-97-01						750.72	574.08		714.34	546.26		716.36	547.8		717.73	548.85		1266.58	
CV-97-27						750.72			714.34										
CV-96-92						552.00	202.00		525.25			526.73			527.74			527.74	
CV97-26						576.00	574.08		576.00	546.26		576	547.8		576	548.85		1124.85	
CV-96-71			640.32	574.08		640.32	65.92		609.29			611.01			527.74			527.74	
CV97-97												450	547.8		274.42	358.86		633.28	
CV97-136															274.42	358.86		633.28	
CV-97-42									357.17			358.16	626.08		358.86			358.86	
CV-97-83									246.87	546.26		247.56	531.56		248.04			248.04	
CV-96-86			375.36	187.68		375.36	187.68		357.17	136.18		358.16			358.86			358.86	
CV-97-74									357.17	315.15		358.16	316.04		358.86	316.64		675.5	
CV-97-39									357.17			358.16	495.88		358.86			358.86	
CV-97-32									525.25	546.26		526.73	547.8		527.74	548.85		1076.59	
CV97-114													547.8			548.85		548.85	
CV97-113												150	226		150			150	
94/21-93/4															600			600	
CV97-170															527.74	105.55		633.29	
CV97-126															506.83			506.83	
CV-96-70				552.00			552.00		525.25			526.73			527.74			527.74	
CV-96-16						552.00	220.80		525.25	210.10		526.73	210.69		527.74	211.1		738.84	
CV-96-56			375.36			375.36			357.17			358.16			358.86			358.86	

CV-97-97										525.25	420.20		526.37	421.38		527.74	422.19	949.93
CV97-165																717.73	548.85	1266.58
CV-97-61										651.31	388.19		683.18	400.32		654.4	401.08	1055.48
CV97-162																358.86		358.86
CV-98-50			375.36	255.00			375.36	255.00		357.17	255		358.18	255		358.86		358.86
CV-97-86										648.00	72.00		648	72		648	72	720
CV97-148																527.74		527.74
CV97-103																300	548.85	848.85
CV97-156																717.73	118.21	835.94
CV-97-28										357.17	0		358.18	0		358.86		358.86
			12804.48	9821.18			30957.78	20719.11		38572.67	21030.78		46967.45	27037.38		56353.83	27034.82	83388.35

APPENDIX D

HCN Resolution No. 3/26/96-A
(Limited Waiver of Sovereign Immunity)

HCN Trial Court Proposal Amending
Resolution No. 3/26/96-A



HO-CHUNK NATION LEGISLATURE

Governing Body of the Ho-Chunk Nation

Ho-Chunk Nation Legislature
Resolution No. 3/26/96-A

Amendment to the Policies and Procedures

WHEREAS, on November 1, 1994, the Secretary of the Interior approved a new Constitution for the Ho-Chunk Nation, formerly known as the Wisconsin Winnebago Nation; and

WHEREAS, the Ho-Chunk Nation ("Nation") is a federally recognized Indian Tribe, organized pursuant to the Indian Reorganization Act of 1934; and

WHEREAS, the Legislature of the Ho-Chunk Nation is the duly constituted governing body of the Ho-Chunk Nation ("Legislature") pursuant to the Constitution of the Ho-Chunk Nation; and

WHEREAS, Article V, Section 2 (a) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to make laws, including codes, ordinances, resolutions, and statutes; and

WHEREAS, Article V, Section 2 (x) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to enact any other laws, ordinances, resolutions and statutes necessary to exercise its legislative powers; and

WHEREAS, Article XII, Section 1 of the Constitution of the Ho-Chunk Nation provides that the Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity; and

WHEREAS, the Legislature finds that one of the purposes of the establishment of the Ho-Chunk Trial Court was to address employee grievances; and

WHEREAS, the Legislature finds that many employee grievances filed in tribal court are or will be dismissed due to the sovereign immunity that the Nation enjoys; and

WHEREAS, without an express waiver, many employee grievances will not be addressed. Now therefore, be it

RESOLVED that the Ho-Chunk Nation Legislature, pursuant to its constitutional authority, hereby amends the Ho-Chunk Nation Personnel Policies and Procedures by inserting the following language to Chapter 12 (Employee Conduct, Discipline, and Administrative Review) following the Administrative Review Process section:

Executive Offices
W9814 Airport Rd. • P.O. Box 667 • Black River Falls, WI 54615
(715) 284-9343 • FAX (715) 284-9805 • (800) 252-2180 (WI only) • (300) 294-9343

Tribal Court Review

a review of an employee grievance may proceed to the Ho-Chunk Nation Trial Court after the Administrative Review Process contained in this Chapter has been exhausted. The Ho-Chunk Nation Rules of Civil Procedures shall govern any judicial review of an employee grievance except for the ten (10) day filing requirement contained in the Nation's Personnel Policies and Procedures.

Limited Waiver of Sovereign Immunity

The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the extent that the Court may award a maximum of $2,000.00 to any one employee. Other remedies shall include an order of the court to the Personnel Department to reassign the employee. Any monetary awards granted under this Chapter shall be paid out of the departmental budget from which the employee grieved. Nothing in this Policies and Procedures shall be construed to grant a party any remedies other than those included in this section.

BE IT FURTHER RESOLVED THAT the remedies provided herein shall have retroactive effect to all cases filed in Trial Court since June 1, 1995 and that nothing herein prohibits employees who have had cases dismissed on sovereign immunity grounds from filing a request for reconsideration with the Trial Court. However, those cases in which the statute of limitation would have tolled under the Nation's Personnel Review Commission Ordinance shall not be entitled to relief.

CERTIFICATION

I, the undersigned, Secretary of the Ho-Chunk Nation, hereby certify that the Ho-Chunk Legislature composed of 11 members, of whom 7 constituting a quorum, were present at the meeting duly called and convened on March 26, 1996 and the foregoing resolution was duly adopted at said meeting by an affirmative vote of 7 members, 0 opposed, 0 abstaining, pursuant to authority of Article V, Section 2 (a) and (x) of the Constitution of the Ho-Chunk Nation approved by the Secretary of the Interior on November 1, 1994, and that said resolution has not been rescinded or amended in any way. I further certify that this is a verified copy of said resolution.

Vicki L. Shisler
Vicki L. Shisler
Assistant Legislative Secretary

3/26/96
Date

popcrs

HCN TRIAL COURT PROPOSAL IN SUPPORT OF AMENDING RESOLUTION 3/26/96-A

I. Introduction and Background of Trial Court Proposal

The HCN Supreme Court severely curtailed the ability of the Trial Court to award relief in employment cases when it held in *Carol Smith v. Rainbow Casino & Bernice Cloud* (HCN Tr. Ct., July 24, 1997), *rev'd in part* (HCN S.Ct., Jan. 9, 1998), that Resolution 3/26/96-A expressly restricted available remedies to reassignment and a maximum monetary award of $2,000. This decision failed to recognize the numerous cases in which the Trial Court as well as the Nation through the Department of Justice has awarded appropriate equitable relief. While the effect of such a holding on prior decisions remains unclear as it remained silent on the issue, the presumption is that the decision works in a prospective manner only, and in the interest of finality past decisions shall go undisturbed. The presumption, however, remains an unsettling one.

As the entity which created the resolution, the authority to amend this statutory provision properly rests with the HCN Legislature. In the ordinary course of governance, the Legislature remains free to amend the resolution in light of the Supreme Court's decision. The Trial Court respectfully presents this report to offer the rationale and concerns supporting an amendment to Resolution 3/26/96-A.

II. The Trial Court Demonstrates Competency & Responsibility

In the 1996 calendar year, the Trial Court issued thirty-one (31) decisions concerning employment disputes. *See, Disposition Table* (attached). Nineteen claims were involuntarily dismissed for various reasons, the prevailing grounds being lack of prosecution. One additional case faces dismissal for lack of prosecution. One case was voluntarily withdrawn for undisclosed reasons. In two cases the Court held in favor of the plaintiff in part and the defendant in part; only one of these cases, however, awarded monetary relief to the plaintiff ($1,248 plus accumulated sick leave). In five cases, settlements were entered into by the Department of Justice with awards to the plaintiff ranging from $750 to an undisclosed amount. A group of three related cases resulted in monetary awards of relief to the plaintiffs in the full amount of $2,000, as well as additional equitable relief restoring seniority, accumulating sick leave, and securing comparable positions elsewhere with the Nation.

In the 1997 calendar year, the Trial Court issued fourteen (14) decisions involving employment grievances. *See, Disposition Table* (attached). One claim was involuntarily dismissed. One claim faces dismissal for lack of prosecution. One case was voluntarily withdrawn. In one case the Trial Court found in favor of the plaintiff in part and the defendant in part with no monetary relief awarded. Eight cases were settled by the Department of Justice, where all but two claims were awarded $2,000 or more; one of these is pending on appeal to the Supreme Court before a final decision on a remaining issue could have been reached by the Trial Court. In two cases, the Trial Court found in favor of the plaintiff. In the first case, the Court awarded a transfer with bridged

services. In the second and final case, upon appeal to the Supreme Court, the plaintiff was limited to an award of $2,000.

III. The Nation Enters Into Settlement Agreements Beyond Resolution Limits

Over a two-year period, therefore, the Trial Court has awarded a total of $9,248 to plaintiffs as well as a number of equitable remedies including expungement of personnel files, reinstatement, transfer, bridged services, and restoration of seniority. On the other hand, the Nation through the Department of Justice has awarded at a minimum $18,699 plus additional equitable relief to plaintiffs in the form of settlement agreements which this Court has approved.

Although the practical effects of sovereign immunity are intended to protect the Treasury of the sovereign, an overview of the history of judicial resolution of employment disputes in the HCN Trial Court demonstrates restraint and responsibility. In light of the above evidence, any fears that the Trial Court would operate otherwise remain without basis in fact or probability. Far from representing a plaintiff's rubber stamp in these cases, the record clearly indicates that the Trial Court does not automatically award the $2,000 maximum available pursuant to Resolution 3/26/96-A. Rather, plaintiffs enjoy a much greater opportunity for recovery through settlement agreements with the Department of Justice.

IV. Amendments to the Resolution Will Not Threaten Sovereign Immunity

A. Awarding Equitable Remedies Should Be Permitted Under the Resolution

Prior to the *Carol Smith* decision, the Trial Court awarded a variety of non-monetary awards in employment cases as a matter of practice. These remedies, which the Trial Court felt were justified by the powers of equity unequivocally granted to the Court in the Constitution, included: expungement of negative references from personnel records, sealed records, reinstatement, placement in a comparable position, restoration of seniority, accumulation of annual and sick leave, and bridged health services. While there may always be a minimal collateral cost of implementing these awards, on the whole, such remedies represent negligible expenses to the Nation. The exception would be an award of accumulated annual leave which may be cashed out at a later date. The value to harmed plaintiffs, however, remains immeasurable. As Resolution 3/26/96-A does not expressly prohibit equitable awards, the Trial Court reasoned that such additional remedies were appropriate when justified under the circumstances in order to make a party whole. Particularly when a plaintiff can only recover $2,000 regardless of actual injury, equitable relief represents a critical alternative to ensure fairness and justice.

B. Increasing or Removing the Ceiling of Monetary Damages Is Justified

An increased ceiling for recovery or a removal of statutory limits altogether would guarantee three things: 1) place the burden of proving damages squarely on the plaintiff where it belongs, 2) force the Trial Court to scrutinize more closely the satisfaction of this burden, and 3) provide

substantive relief to make a legitimately harmed litigant as whole as possible under the circumstances. Aside from the demonstrated record of the Trial Court in these matters, constitutional provisions prohibit the Trial Court from operating unchecked as all parties possess the right to appeal a final judgment or order to the Supreme Court. Thus, a process exists to address any concerns of an overly sympathetic Court.

Although Resolution 3/26/96-A has been in effect only since March 26, 1996, the $2,000 ceiling was established several years earlier. Perhaps most telling, the ceiling was established at a time where one might face a multitude of potential employment claims which foreseeably could have crippled the Nation. As this is no longer the case, the historical justification for the resolution becomes weak. Moreover, not once since this time has the Resolution been amended to account for inflation or a cost of living adjustment. Assuming a conservative backdrop rate of 4% per year, the amount could have been raised 16-20%. Such an adjustment, however, does not even approach the problems the limited waiver raises in practice as a handful of cases demonstrate the fundamental unfairness of Resolution 3/26/96-A. In *Sandra Sliwicki v. Rainbow Casino & HCN* (HCN Tr. Ct., Dec. 9, 1996), *rev'd* (HCN S.Ct., June 20, 1997), *settled* (HCN Tr. Ct., Sept. 3, 1997), the plaintiff earned over $52,000 a year in her previous position but was relegated to a maximum $2,000 recovery. In a given case, a claimant bringing an employment grievance must wait an uncertain amount of time for resolution. In the event that the plaintiff is successful, regardless of actual damages incurred (whether lost wages, sick leave, annual leave, or even seniority), $2,000 is the maximum recovery available.

C. Amending Resolution Strengthens Internal Administration of Government

In recent years, a substantial administration has developed within the Ho-Chunk Nation to assist in the creation and implementation of programs and services. This development reflects the best of sovereignty at work. Governed by the Policy and Procedures Manual, an internal Administrative Review Process deals with employee grievances and provides a system grounded in the rule of law. Ultimately, this process is about accountability as it establishes an ordered structure of grievances and appeals to de-personalize and de-politicize the system to protect employees as well as the Nation. By substantially amending or removing the statutory cap on recovery and permitting the Courts to award proven damages to harmed individuals in order to make them whole, accountability is reinforced. Such an amended resolution would require a more dedicated adherence to the Policy and Procedures Manual and force the Administrative Review Process to serve its purpose. In this regard, many legitimate claims could be settled early on or avoided altogether as the grievances of employees are addressed in a meaningful way. This position supports efficiency and economy as only the irreconciliable employee claims would reach the Trial Court. Moreover, the resources of the Nation would be protected as only proven claims would be awarded relief.

D. Amending Resolution Strengthens External Views of Ho-Chunk Sovereignty

In the interest of building both internal and external trust in the competency and fairness of the Nation and its government, more flexible guidelines would permit the Trial Court to award

complainants what they prove to be their damages as in any other court of law and equity. By building belief in the system, tribal sovereignty becomes less of a defensive shield and more of a commonplace characteristic which should remain beyond question similar to county and state governments. In a world in which the Ho-Chunk and non-Ho-Chunk necessarily interact on a daily basis, the perception of all who come into contact with the Nation is critical. An increased recovery amount or its complete removal would assist in this process as litigants recognize that a fair and meaningful recovery may be awarded for legitimate claims.

V. The Present State of Affairs Threatens Pending Cases

A pressing issue involves the status of four settlement agreements pending before the Trial Court: *Eric Lonetree v. Ho-Chunk Casino, et al.*, CV 97-30; *Emmet Walker, Jr. v. HCN, et al.*, CV 97-48; *Gary Snowadski v. Ho-Chunk Casino*, CV 97-49; and *Debra Chase-Skenandore v. Ho-Chunk Nation*, CV 97-77. The *Carol Smith* decision calls into question the ability of the Trial Court to approve such negotiations in the event the agreement exceeds the limits of Resolution 3/26/96-A, even if an approval amounts merely to an administrative matter rather than a substantive endorsement of such action. There is after all a significant distinction between the Court reaching a decision on its own within existing statutory constraints and the Court approving a contractual arrangement between the Nation and a private party. The Trial Court awaits a full briefing on the matter from the Department of Justice before reaching a decision.

Furthermore, in the event it is determined the Trial Court cannot approve such terms, the *Carol Smith* decision threatens to limit all potential plaintiffs to a $2,000 cap on recovery as the Department of Justice would be precluded from offering settlement terms outside the scope of Resolution 3/26/96-A. The Trial Court ultimately believes such a proposition remains unfair and unworkable and requests amendments of Resolution 3/26/96-A to ensure a fuller measure of justice.

Ho-Chunk Nation Legislature
Resolution No. __/__/98-A

Amendment to Resolution 3/26/96-A

WHEREAS, on November 1, 1994, the Secretary of the Interior approved a new Constitution for the Ho-Chunk Nation, formerly known as the Wisconsin Winnebago Nation; and

WHEREAS, the Ho-Chunk Nation ("Nation") is a federally recognized Indian Tribe, organized pursuant to the Indian Reorganization Act of 1934;

WHEREAS, the Legislature of the Ho-Chunk Nation is the duly constituted governing body of the of the Ho-Chunk Nation ("Legislature") pursuant to the Constitution of the Ho-Chunk Nation;

WHEREAS, Article V, Section 2 (a) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to make laws, including codes, ordinances, resolutions, and statutes; and

WHEREAS, Article V, Section 2 (x) of the Constitution of the Ho-Chunk Nation authorizes the Legislature to enact any other laws, ordinances, resolutions, and statutes necessary to exercise its legislative powers; and

WHEREAS, Article XII, Section 1 of the Constitution of the Ho-Chunk Nation provides that the Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity; and

WHEREAS, the Legislature finds that one of the purposes of the establishment of the Ho-Chunk Nation Trial Court was to address employee grievances; and

WHEREAS, the Legislature finds that many employee grievances filed in tribal court are or will be dismissed due to the sovereign immunity that the Nation enjoys; and

WHEREAS, without an express waiver, many employee grievances will not be addressed.

WHEREAS, the Legislature adopted Resolution 3/26/96-A to provide for a limited waiver of sovereign immunity which has become impractical. Now, therefore, be it

RESOLVED that the Ho-Chunk Nation Legislature, pursuant to its constitutional authority, hereby amends the Ho-Chunk Nation Personnel Policies and Procedures by inserting the following language to Chapter 12 (Employee Conduct, Discipline, and Administrative Review) following the Administrative Review Process section:

Tribal Court Review

a review of an employee grievance may proceed to the Ho-Chunk Nation Trial Court after the Administrative Review Process contained in this Chapter has been exhausted. The employee need not exhaust the Administrative Review Process upon a proper showing of futility to the Trial Court through clear and convincing evidence. The Ho-Chunk Nation Rules of Civil Procedure shall govern any judicial review of an employee grievance except for the ten (10) day filing requirement contained in the Nation's Personnel Policies and Procedures.

Limited Waiver of Sovereign Immunity

The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the extent that the Court may award a maximum of $10,000 to any one employee. Other equitable remedies shall include, but not be limited to, an order of the Court to the Personnel Department to reassign or reinstate the employee, expunge negative references from personnel files, bridged services, and restoration of seniority. Any monetary awards granted under this Chapter shall be paid out of the departmental budget from which the employee grieved. Punitive damages are not available. Nothing in this Policies and Procedures shall be construed to grant a party any legal remedies other than those included in this section.

BE IT FURTHER RESOLVED THAT the remedies provided herein shall have retroactive effect to all cases filed in the Trial Court since June 1, 1995 and that nothing herein prohibits employees who have had cases dismissed on sovereign immunity grounds from filing a request for reconsideration with the Trial Court. However, those cases in which the statute of limitation would have tolled under the Nation's Personnel Review Commission Ordinance shall not be entitled to relief.

CERTIFICATION

I, the undersigned, Secretary of the Ho-Chunk Nation, hereby certify that the Ho-Chunk Legislature composed of ____ members, of whom ___ consisting a quorum, were present at the meeting duly called and convened on March 26, 1996 and the foregoing resolution was duly adopted at said meeting by an affirmative vote of ___ members, ___ opposed, ___ abstaining, pursuant to authority of Article V, Section 2(a) and (x) of the Constitution of the Ho-Chunk Nation approved by the Secretary of the Interior on November 1, 1994, and that said resolution has not been rescinded or amended in any way. I further certify that this is a verified copy of said resolution.

_____ _____

Vicki L. Shisler Date
Legislative Secretary



Independent Analysis Prepared For
The Six Tribal Jurisdictions Of Western Nevada

The attached analysis reaches two important conclusions:

(1) rather than being a burden on the State government, these six Indian tribes contribute 4 times more in state tax revenues than the state expends for the benefit the Tribal jurisdictions;

(2) the stronger the reservation economies the greater the tax revenue collections for the State.

The analysis concludes "that the activities of the six Tribal jurisdictions cause the State to receive approximately $4.7 million annually in tax revenues. In comparison, approximately $1 million in State General Fund expenditures are made annually for the direct benefit of residents of the six Tribal Government jurisdictions."

Pursuant to Nevada State law and Tribal–State agreements, the Tribal jurisdictions in Nevada collect Tribal sales and excise taxes in lieu of the state taxes. This has resulted in a unique and mutually beneficial arrangement with the State government and the citizenry of Nevada.

These six Tribal jurisdictions use the revenues they raise through the tribal sales tax and tribal enterprises to provide a full of government services to all residents of the jurisdictions – Indian and non–Indian alike. The Tribal governments provide such essential services as law enforcement, Tribal courts, health care, social services, education, and elder care. Moreover, the Tribal jurisdictions maintain and develop infrastructure, such as roads and sewer systems, necessary to serve the needs of the reservation and colony businesses and residents. For the most part, the State does not provide these essential governmental services to Tribal jurisdictions. Put another way, State generated tax revenues are <u>not</u> used to provide these government services on tribal jurisdictions.

The State receives numerous direct and indirect benefits from strong tribal economies. In order to have strong tribal economies, Tribal governments must be adequately funded and capable of providing efficient governmental services. The State of Nevada and the Tribes of Nevada have forged and maintain a mutually beneficial relationship. The measures proposed in S. 1691 would upset this careful balance and undermine the tribal–state relationship. This is a matter Indian tribes and states, not Congress, should continue to resolve based upon the specific circumstances facing them.

The Economic Importance of Six Self-Governing Tribal Jurisdictions in Western Nevada

An Independent Analysis
Prepared for the Tribal Jurisdictions of:
Fallon ❖ Pyramid Lake ❖ Reno-Sparks
Walker River ❖ Washoe ❖ Yerington

Prepared by:
The Center for Applied Research
1738 Wynkoop Street, Suite 200
Denver, Colorado 80202

March, 1997

Executive Summary

This analysis is concerned with the economic importance of six Tribal government jurisdictions in western Nevada: the Fallon Reservation, the Pyramid Lake Reservation, the Reno-Sparks Indian Colony, the Walker River Reservation, the Washoe Reservation, and the Yerington Reservation.

These six Tribal Government jurisdictions stimulate approximately 2,436 jobs, $61 million in income, and $4.7 million in State tax revenue for residents throughout Nevada. These State-wide impacts occur due to:

- $31.6 million in annual personal consumer expenditures that are made by residents of the six Tribal jurisdictions;
- $35.2 million in annual expenditures for goods and services that are made by the six Tribal jurisdiction governments; and
- $23.9 million in annual wage and salary and procurement expenditures that are made by Federal agencies involved in transactions with the six Tribal Governments.

This study reveals a net positive economic and fiscal impact to the State of Nevada due to the activities of these six Tribal jurisdictions and their unique fiscal relationship with the State. The economic impact of the six Tribal jurisdictions on State income and employment is shown in Table ES-1.

Table ES-1
1995 State-wide Income and Employment Attributed to Six Tribal Jurisdictions in Western Nevada
(Source: 1995 Tribal Budget Data; The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997; U.S. Consolidated Federal Funds Report, Fiscal Year 1995.)

Source of Economic Impact	Annual Value of Expenditures	Expenditures Made in Nevada	Created Wage and Salary Income in Nevada	Created Employment in Nevada
Tribal Household Income Expenditures	$31,610,343	$25,288,273	$21,242,150	849
Tribal Government Expenditures	$35,240,400	$28,192,320	$23,681,548	946
Federal Agency Expenditures	$23,893,409	$19,114,727	$16,056,370	641
Totals	$90,744,152	$72,595,320	$60,980,068	2,436

The State of Nevada receives revenue as a result of this Tribal/State relationship and avoids additional social service costs that could result if Nevada's Indian Tribes were not self-sufficient. As this study shows, the economic activities of the six Tribal jurisdictions cause the State to receive approximately $4.7 million annually in tax revenues. In comparison, approximately $1 million in State General Fund expenditures are made annually for the direct benefit of residents of the six Tribal Government jurisdictions. Any perception that Tribal jurisdictions are a fiscal or economic burden on the State is clearly unfounded.

Indian Tribal governments have historically provided a wide range of services for their resident populations. Toward this end, tribes have utilized their inherent right and statutory power of taxation to: 1) raise revenues to operate Tribal government; 2) provide essential services such as law enforcement, Tribal courts, health care, social services, education and elder care; and 3) maintain and develop infrastructure, such as roads and sewer systems, necessary to serve the needs of reservation and colony businesses and residents.

It is not generally known that Indian Tribal governments possess powers that are essentially similar to all sovereign states. In particular, the power to tax enables Tribal governments to ensure that economic activity on the reservations will provide a measure of benefit to the whole of the reservation community, and that those engaged in this activity, the reservation-based private sector, will have available the organized workings of government to serve their needs and protect their interests.

Tribal jurisdictions in Nevada are authorized to collect sales tax and are exempted from state cigarette excise taxes. This has resulted in a unique and mutually beneficial arrangement with the State government and the citizenry of Nevada. The Tribes utilize the tax revenue to defray the cost of maintaining their reservations and to insure a high quality of Tribal governance and Tribal services. It should be noted that smokeshop revenues, which benefit from the exemption from state cigarette excise taxes, cover a minimum of 5% and no more than 20% of the six respective Tribal governments' total cost of governance. As with State and local governments, meeting the escalating cost of governance on the reservations and colonies is the never-ending challenge of the six Tribal governments. At a time when federal and State budgets are being stretched to the limit, maintenance of this Tribal/State relationship is of utmost importance to *both* the Tribal jurisdictions and the State.

Residents of Tribal jurisdictions in Western Nevada create jobs and income in the State economy when they spend their disposable income in neighboring communities. A significant portion of the money reservation residents spend provides wages and salaries

for the employees of the businesses being patronized. This in turn, generates additional economic activity as the recipients of expenditures made by reservation residents make their own personal expenditures for goods and services, thus contributing to a multiplier or "indirect" economic effect in the local and state economy.

Total household income of the six Tribal jurisdictions in western Nevada in 1995 was about $31.6 million, and approximately $25.3 million of this income was spent off of the reservations and colonies in the local economies of Nevada. Revenue impacts occur when individual Tribal members spend a portion of their household income for goods and services off the reservation or colony. For example, any resident (Indian or non-Indian) of any one of the six Tribal jurisdictions must pay sales tax on taxable items purchased off the reservation/colony. In light of the low degree of diversification in the reservation/colony economies, virtually all consumer expenditures are made in the off-reservation communities in northwestern Nevada (e.g., Reno, Fallon, and Carson City).

In addition to this direct tax revenue effect, the consumer expenditures of individual Indian households are an indirect source of tax revenue since their purchases create or "induce" jobs in the Nevada economy and these job holders also make taxable purchases throughout the State. Similar indirect fiscal impacts occur when reservation/colony businesses and Tribal governments purchase goods and services off the reservation. Even though the purchases of Tribal governments are exempt from taxation, the wage and salary income and the jobs created as a result of Tribal government purchases, do lead to a tax revenue benefit to the State. Like all government jurisdictions, Tribal governments, while being immune from taxation, nevertheless support jobs (and indirectly, sales tax revenue) in the State economy when they make expenditures throughout the State for goods and services.

Tribal government expenditures create jobs and income in the State economy in a very similar way. Tribal governments create employment in the State when they purchase inventory, goods and services for their private sector and government operations and enterprises. A portion of these purchases create wage and salary income for others throughout the State which ultimately generate a tax revenue benefit for the State as well.

Federal government agencies involved in Indian health services, public works, reservation resource management, labor, and housing construction also create jobs and income in the State. This provides disposable income which is spent in the Nevada economy, a portion of which would not exist in the State without the presence of the six Tribal jurisdictions.

Indian Tribes have historically been an important source of federal expenditures in the State of Nevada. Unlike defense related federal expenditures, or other federal outlays that

are subject to dramatic fluctuation, the federal government/Indian Tribal government relationship has been remarkably stable for decades. Approximately $19.1 million per year in federal government expenditures are made in Nevada specifically as a result of federal transactions with the six Tribal jurisdictions included in this analysis.

Stronger reservation economies would mean even more revenue collections for the State as well as increased employment and income throughout the Nevada economy. This analysis offers a compelling argument for the State and its citizens to support the economic development efforts of the six Tribal jurisdictions.

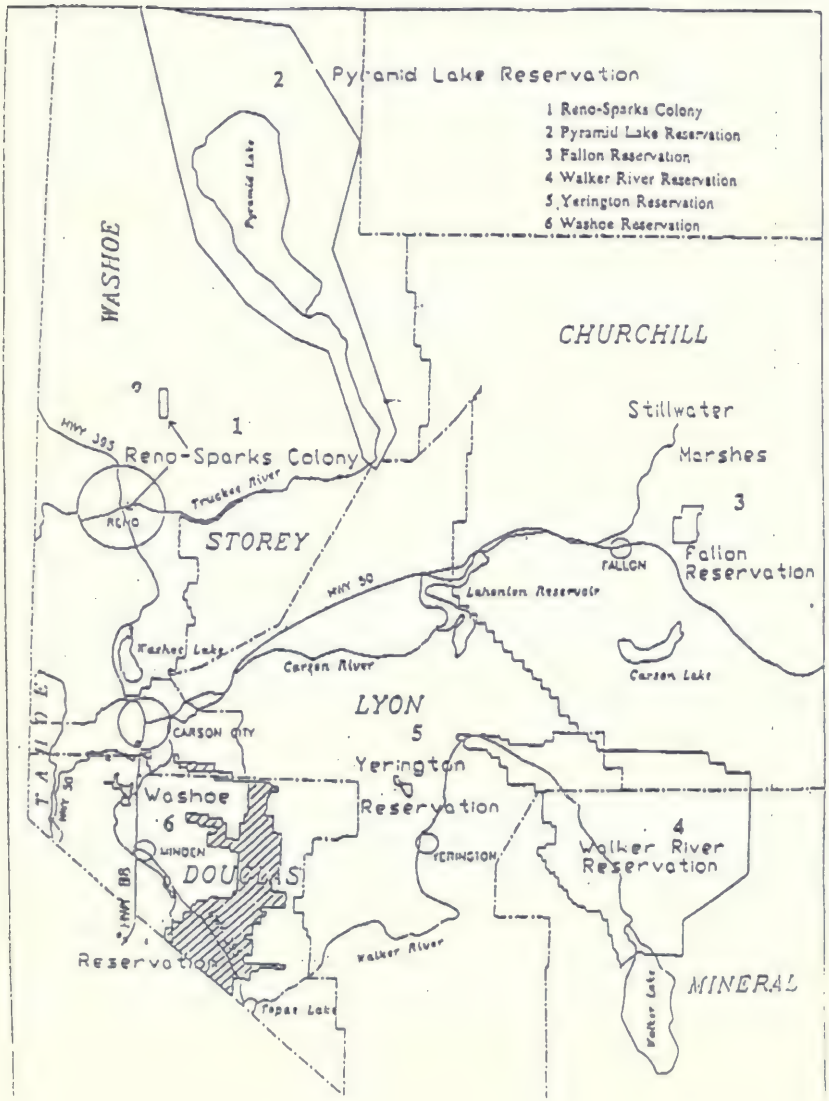
I. Introduction

This report is the result of a unique cooperative effort of six American Indian Tribal governments in western Nevada who have initiated a systematic research effort to document how their economies affect, and are affected by, the broader State economy and revenue system of Nevada. Through this report, these Tribal governments are sharing research findings that are highly relevant to the political and business leadership of the State and to the citizenry at large.

This study focuses on six Tribal government jurisdictions in western Nevada: the Fallon-Paiute Reservation, the Pyramid Lake Reservation, the Reno-Sparks Indian Colony, the Walker River Reservation, the Washoe Reservation, and the Yerington Reservation. There are actually twenty-four Tribal jurisdictions in the State of Nevada (see Figure 1). These six Tribal jurisdictions thus do not include all of Nevada's Indian population, and the extent of their economic and fiscal importance may be seen as representative of a larger impact that could be associated with the State's total American Indian presence. This study has focused only on the six Tribal jurisdictions identified above which have chosen to join in a unique inter-tribal economic research effort.

Figure 1

Six Tribal Jurisdictions in Western Nevada



II. A Profile of Six Tribal Jurisdictions in Western Nevada

There has been much written about the importance of Nevada's gaming, tourism, mining, and national defense related industries, however the economic and fiscal importance of the State's Indian reservations is seldom observed. One reason for this lack of knowledge and awareness of the economic role of Nevada's Indian reservations is the sovereign and independent nature of the Indian Tribal governments themselves. Tribal governments rarely publicize the economic influence their respective jurisdictions have in Nevada's state-wide economy.

Indian Tribal governments have historically provided a wide range of services for their resident populations. Indeed, Indian Tribal governments in nearly all respects, are analogous to the State government and in some important respects, analogous to the Federal Government. They provide essential government services, compete for grants and contracts and are engaged in corporate as well as governmental ventures and enterprises.

A. Individual Profiles of Six Tribal Jurisdictions

In this study an important distinction is made between Native American Indian Tribes and the reservations and colonies (jurisdictions) where Tribal members actually reside. The analysis in this report is concerned with Tribal jurisdictions, more specifically, six reservations and colonies in Western Nevada. "Tribe" is the designation given to a group of natives sharing a common ancestry, language, culture and name. A federally recognized Tribe is a Tribe with which the U.S. government maintains official relations. Tribal members can live on or off Tribal lands and non-Indians can and do reside within reservation and colony boundaries.

There are three Tribes in Western Nevada: the Washoe Tribe, the Paiute Tribe and the Shoshone Tribe; however, Tribal lands are organized into six independent Indian reservations or colonies. The term "Tribal government jurisdiction" is used in this report to refer to the Washoe, Walker River, Fallon, Reno-Sparks, Pyramid Lake, and Yerington

reservations or colony land bases and economies.[1]

The term "Indian reservation" refers to the actual lands, set aside by the U.S. for use and occupation by a group of Indians. In addition to reservation lands, lands can include various colonies which have been set aside for Tribal use by federal legislation to provide land near or within city boundaries for the purpose of Tribal business enterprises and residential uses. Again, reservation and colony residents can include Indian and non-Indian residents alike.

1. The Fallon Paiute-Shoshone Tribe

The Fallon Paiute-Shoshone Tribal trust lands include 3,480 acres of Tribal land and 4,640 acres of allotted land located east of Fallon, Nevada, and 60 acres of land in the Fallon Colony. There are 995 residents on the Fallon Reservation and Colony. Total enrolled membership is 930.

Tribal Government Organization and Operations

The Fallon Business Council was established pursuant to the Constitution and By-Laws of the Fallon Paiute-Shoshone Tribe; it is the organization responsible for managing the resources and governance of the Fallon Tribe. The Tribe is committed to advancing the community's long-range goals toward social and economic self-sufficiency, through the proposed development of a comprehensive land development plan which will organize the land use and social priorities of the Fallon Reservation and Colony and strengthen the Fallon Business Council's abilities to govern development and direct Tribal resources. The current Chairperson is Mr. Alvin Moyle.

Reservation Based Enterprises

Agriculture and Tribal enterprises form the economic foundation of the Fallon Reservation. The Tribe also operates a smoke shop and gift shop and receives income from a geothermal lease. The Tribe employs 130 people, 87 of whom are full time. Agriculture, and in particular, alfalfa production, is a key agricultural enterprise. There

[1]More detailed descriptions of the six Tribal jurisdictions can be found in the Nevada Indian Commission Directory (March, 1994) and the Bureau of Indian Affairs' Reservation Profiles for the State of Nevada (1994)

are approximately 11 full time farmers on the Reservation. Approximately 2,800 acres are devoted to alfalfa, yielding about 5 tons per acre. Six main ranches on the Reservation raise approximately 500 head of cattle. Recreational activities on the reservation include fishing and pheasant hunting during season. The Tribe holds the Fallon All-Indian Stampede and Pow Wow annually in mid-July. The Tribe also maintains the Pheasant Club, a commercial hunting club open for pheasant hunting. There are plans to open a trap shoot, skeet shoot, rifle ranges, fishing accommodations, and a club house. A privately owned gallery located in Fallon sells Indian-made arts and crafts fashioned from stone, wood, metal.

2. The Pyramid Lake Paiute Tribe

The Pyramid Lake Indian Reservation consists of 476,728 acres of Tribal land located approximately 50 miles northeast of Reno. The Pyramid Lake Tribal jurisdiction is the largest in population size with 1,946 residents. Approximately 45% of the population resides in Nixon, Nevada; 40% in Wadsworth, Nevada; and 15% in Sutcliffe, Nevada. The majority of the Pyramid Lake Paiute Tribe's 1,800 enrolled members reside on the reservation.

Tribal Government Organization and Operations

The Pyramid Lake Paiute Tribe is governed by ten Tribal Council members who are elected bi-annually in December and on staggered two year terms. The Tribal Government provides a range of services to Tribal members such as: social services, law enforcement, judicial services, Senior Citizens Nutrition Program, roads and maintenance, health clinic services, substance abuse/awareness/counseling, housing, child care, water quality program, fishery restoration and high school educational services. A Tribal gym and community hall is utilized for sports and community activities. The current chairperson is Mr. Mervin Wright.

Reservation Based Enterprises

Tribal business enterprises on the Pyramid Lake Reservation are operated in Sutcliffe and Wadsworth. In Sutcliffe, a convenient store, gas station, and video store are Indian owned and run. In addition, a visitor center, marina, RV park, boat docks and boat storage, as well as an additional convenient store and gas pumps are all Tribal owned and

run. A non-Indian, privately owned lodge with bar, convenient store, gas pumps and boat storage are also run in Sutcliffe. In Wadsworth, there is a Tribal owned smoke shop, convenient store, gas station, RV park and 24-hour towing and storage business. Wadsworth also has a non-Indian owned Inn with a bar, a mechanic shop and car sales business, and a gravel pit leased by the Tribe. The Cattleman's Association is a Tribal organization which employs 10 individual Tribal members working cattle ranches. The reservation is also the site of the Pyramid Lake and its surrounding reservation areas, which offer recreational activities such as camping, fishing, hiking, boating, and picnicking on 70 miles of beach.

3. The Reno-Sparks Indian Colony

The Reno-Sparks Indian Colony consists of 1,978 acres of Tribal land in two colonies located in Reno and in Hungry Valley north of Sparks. (See Figure 1.) The property surrounding the urban reservation (30.8 acres) is primarily commercial and industrial.

The Reno-Sparks Colony has a population of 797 residents located in the two colonies located in Reno and Hungry Valley. The total membership of Reno-Sparks is 877.

Tribal Government Organization and Operations

Tribal administrative offices are located in Reno as well as a health clinic and facilities providing access to social services, such as counseling, education, senior citizen programs, police and Tribal court systems and youth programs. The Tribe maintains two community centers with a variety of facilities. The current Tribal Council consists of 7 Tribal members. A new Council is elected every 2 years. The current chairperson is Mr. Arlan D. Melendez.

Reservation-Based Enterprises

The Reno-Sparks Indian Colony operates three smoke shops, the Sierra Press, which performs commercial offset printing, publishes magazines, and employs 52 people. The Colony also leases numerous rental properties, including Colony Motors auto sales. The Colony Corners Mini-Mall, which includes one of the Tribal smoke shops, also leases space to a jewelry store, hair salon and comic book outlet. The Tribe employs approximately 160 people and approximately 95 percent of these are full-time positions.

Of this total. 30% are non-Indian employees. The Reno-Sparks colony hosts a number of special events. including Numaga Indian Days Celebration over Labor Day Weekend and a Christmas crafts sale in early December.

4. The Walker River Paiute Tribe

The Walker River Indian Reservation consists of 323,405 acres and encompasses land in three counties south of Fallon near Schurz. Nevada. There are 1,149 persons residing on the Walker River Reservation and total enrolled membership of the Walker River Tribe is 1,781.

Tribal Government Organization and Operations

The Tribal Government consists of seven elected Tribal Council members whose terms are staggered, with elections being held each year. The Tribal Chairman is elected within the Council each year following elections. The Tribal Council currently oversees a Social Services Department, Health Clinic, Senior Citizens Center, Water Resources Department, Wetlands programs, Land Use Planning program, Finance Department, Taxation Department, Education Department, Tribal Enrollment System, Personnel/Tero Department, Judicial Department, Law Enforcement Services, Emergency Medical Services and a volunteer Fire Department. The current chairperson is Mr. Jonathan Hicks.

Reservation Based Enterprises

The Walker River Tribal economy is based on agricultural enterprises as well as small commercial enterprises. Enterprises operated by the Tribal government include a smoke shop/mini market, restaurant, a truck-stop and a livestock/feedlot operation. The Tribe employs 106 people; approximately 90% of these are full-time employees. Also operated on the Reservation are a mini-market, hair salon, construction companies, a leather shop, a crafts store, and a tack shop which are all Indian-owned. There is also a non-Indian owned tow truck/mechanic shop, a truck stop/diesel mechanic shop, a motel, a trailer park and an athletic training center/school. Private, reservation based enterprises include construction contractors, garbage pickup businesses, a beauty shop and a plumbing enterprise. Reservation-based recreational activities include hunting, trapping, fishing and hiking.

of these, 60 work full time and the rest are part time or on call. In addition, there are private, reservation-based businesses operated by Tribal members which include a child care service, a janitorial service and a construction company. The Tribe sponsors various pow wows, including the Nevada Day Pow wow on October 31 and the annual Wa She Shu Eden festival at Lake Tahoe during the last weekend in July.

6. The Yerington Paiute Tribe

The Yerington Reservation and Trust Lands comprise approximately 1,900 acres of Tribal land located 85 miles southeast of Reno. The Yerington Reservation population is 599 and the total membership is 760. Approximately 179 households are located on the reservation and 100 at the Colony.

Tribal Government Organization and Operations

The Yerington Paiute Tribal Council is comprised of a 7 member governing body. Members are elected from this group and serve a 2 year term in the positions of Tribal chairman, vice-chairman, and council members. The main function of the council is to promote and secure the social and economic well being of the Tribal members. The Tribal chairman serves as the Tribal administrator and supervises the day-to-day operation of the Yerington Paiute Tribe. The Tribal Government provides the following services: social services, education, law enforcement, judicial services, road maintenance, irrigation, public works, construction, nutrition counseling, water systems and a variety of health services. The current chairperson is Mr. Elwood Emm.

Reservation Based Enterprises

The major reservation-based enterprises on the Yerington Reservation include an alfalfa ranch, a gas station and convenience store, a Tribal smoke shop, a fast food franchise and a Rite of Passage athletic program. The Yerington reservation also maintains archaeological and historical sites at Campbell Ranch.

Tables 1 through 4 below, show the basic socioeconomic characteristics of the six Tribal jurisdictions in western Nevada. Figures 2 through 4 show the expenditures made in Nevada by households, Tribal governments, and Federal agencies, respectively.

Table 1
1995 Household Income of Six Tribal Jurisdictions in Western Nevada
(Source: U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997; The Center for Applied Research 1997.)

Tribal Jurisdiction	Population	Number of Households*	Total Household Income
Fallon	995	227	$4,389,144
Pyramid Lake	1,946	436	$8,430,249
Reno-Sparks	797	199	$3,847,753
Walker River	1,149	263	$5,085,219
Washoe	1,519	473	$9,145,659
Yerington	599	179	$3,461,043
Totals	7,005	1,777	$34,359,067

*A household is defined by the U.S. Bureau of the Census to be the sum of all persons who occupy a housing unit. A housing unit is a house, an apartment, a mobile home, a group of rooms, or a single room that is occupied as a separate living quarters. Household income includes all earned income as well as unearned income and an imputed amount of "income" reflecting the value of transfer payments where applicable. All data is from the U.S. Bureau of the Census 1990 enumeration and 1995 projections.

Table 2
1995 Household Expenditures by Six Tribal Jurisdictions in Western Nevada
(Source: The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997.)

Tribal Jurisdiction	Total Household Expenditures	Expenditures for Goods and Services in Nevada
Fallon	$4,038,013	$3,230,410
Pyramid Lake	$7,755,829	$6,204,663
Reno-Sparks	$3,539,933	$2,831,946
Walker River	$4,678,402	$3,742,721
Washoe	$8,414,006	$6,731,205
Yerington	$3,184,160	$2,547,328
Totals	$31,610,343	$25,288,273

Table 3
1995 Expenditures by Six Tribal Governments in Western Nevada
(Source: The Center for Applied Research, 1997; 1995 Tribal Budget Data.)

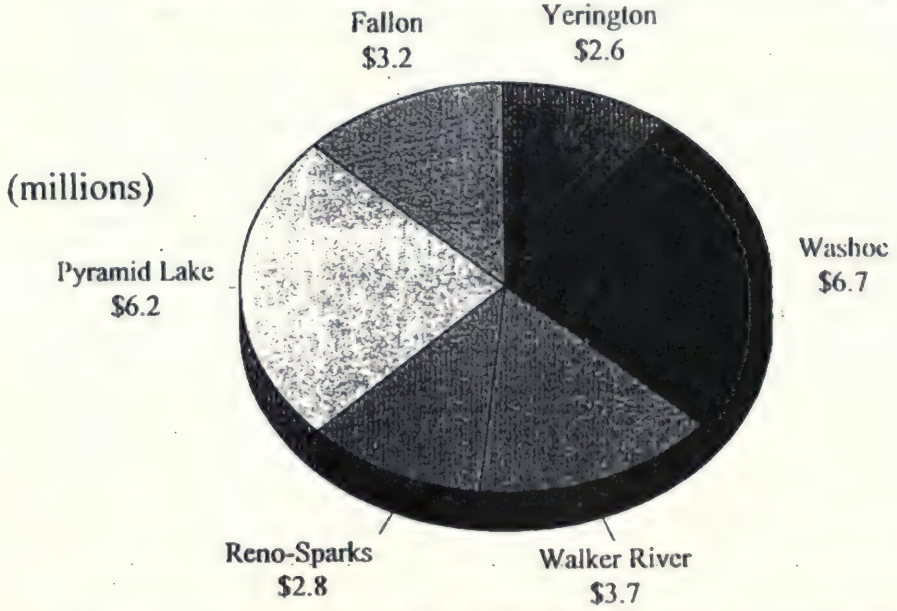
Tribal Jurisdiction	Total Governmental Expenditures	Expenditures for Goods and Services in Nevada
Fallon	$3,412,655	$2,730,124
Pyramid Lake	$10,023,375	$8,018,700
Reno-Sparks	$6,150,145	$4,920,116
Walker River	$5,648,554	$4,518,432
Washoe	$6,912,217	$5,529,784
Yerington	$3,093,454	$2,475,164
Totals	**$35,240,400**	**$28,192,320**

Table 4
1995 Federal Agency Expenditures Attributable to Six Tribal Jurisdictions in Western Nevada
(Source: The Center for Applied Research, 1997; U.S. Consolidated Federal Funds Report, Fiscal Year 1995, U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997.)

Federal Department	Total Federal Expenditures	Expenditures for Goods and Services in Nevada
Department of Interior	$8,105,708	$6,484,566
Housing and Urban Development	$6,056,076	$4,844,861
Health and Human Services	$3,513,097	$2,810,478
Department of Labor	$899,121	$719,297
Other*	$5,319,407	$4,255,525
Totals	**$23,893,409**	**$19,114,727**

*Includes: U.S. Department of Energy; U.S. Department of Agriculture; Environmental Protection Agency.

Figure 2
1995 Household Expenditures by Six Tribal Jurisdictions in Western Nevada
$25.2 million for Goods and Services in Nevada

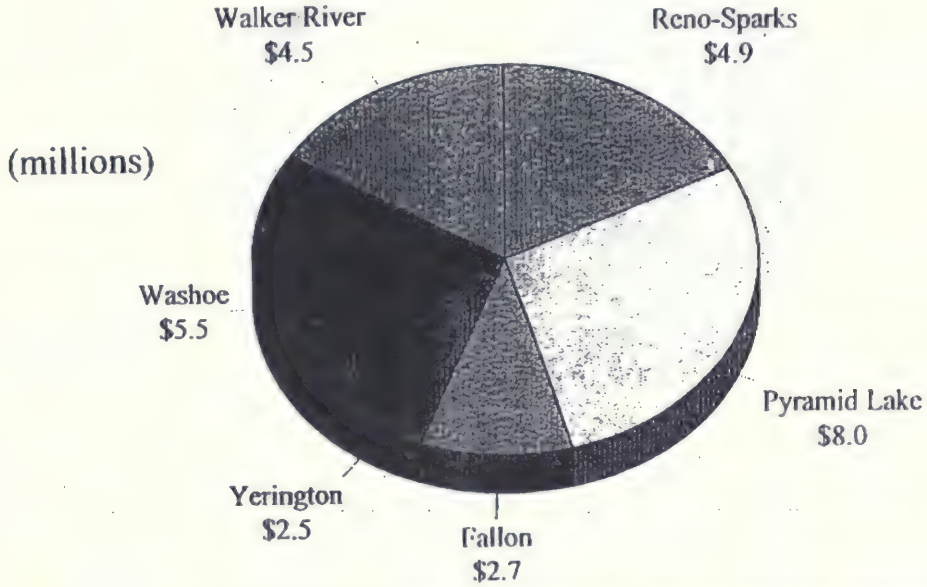


(Source: The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997.)

Figure 3

1995 Expenditures by Six Tribal Governments in Western Nevada

$28.1 million for Goods and Services in Nevada

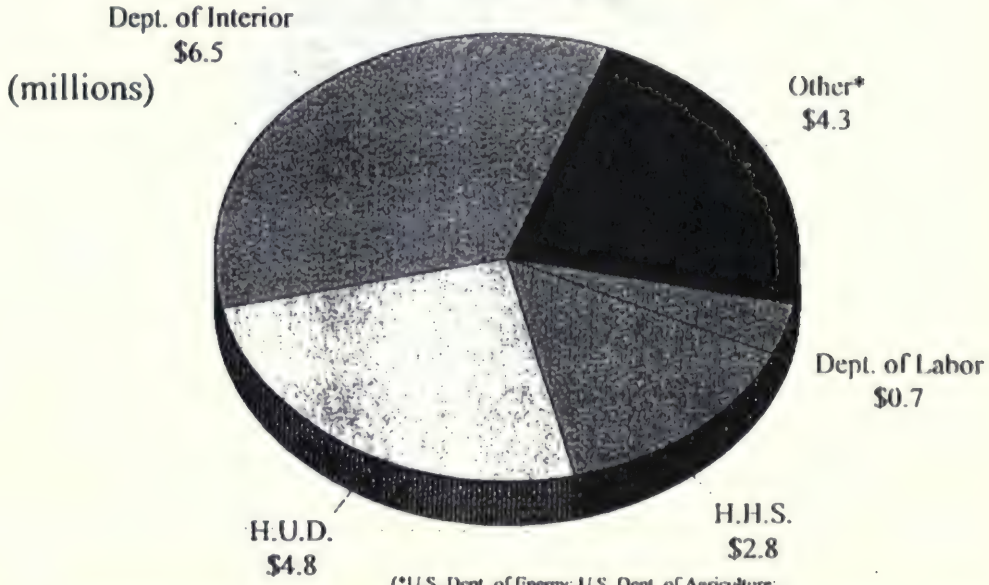


(Source: The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997, U.S. Department of Commerce; 1997.)

Figure 4

1995 Federal Agency Expenditures Attributable to Six Tribal Governments in Western Nevada

$19.1 million for Goods and Services in Nevada



(*U.S. Dept. of Energy; U.S. Dept. of Agriculture; Environmental Protection Agency)

(Source: The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997, U.S. Department of Commerce, 1997.)

III. The Economic and Fiscal Importance of Six Tribal Jurisdictions in Western Nevada

Residents of Tribal jurisdictions in Western Nevada create jobs and income in the State economy when they spend their disposable income in neighboring communities such as Reno and Carson City; a portion of the money reservation residents spend, provides wages and salaries for the employees of the businesses being patronized. This in turn, generates additional economic activity as the recipients of the expenditures made by reservation residents make their own personal expenditures for goods and services, thus contributing to a multiplier or "indirect" economic effect in the local and state economy.

Tribal government expenditures create jobs and income in the Nevada economy in a very similar way. Tribal governments create employment in the State when they purchase inventory, goods and services for their private sector and government operations and enterprises. A portion of these purchases create wage and salary income for others throughout the State which ultimately generate a tax revenue benefit for the State as well.

Federal government agencies involved in Indian health services, public works, reservation resource management, labor, and housing construction also create jobs and income in Nevada. This provides disposable income which is spent in the State economy, a portion of which would not exist in the State without the presence of the six Tribal jurisdictions.

The fiscal importance of Tribal jurisdictions in the State of Nevada can be measured by the revenue the State collects due to the economic activities associated with the three broad activities described above. The expenditures the State makes for, or on behalf of, the six Indian jurisdictions and their residents are also important to recognize.

A. The Economic Impacts of Household Expenditures

The six Tribal Jurisdictions and reservation-based businesses directly employ over 900 people. The majority of reservation job holders (over 500) are employed by the Tribal governments with the reservation service sector accounting for the second largest source of employment. Approximately 130 employees work directly for Tribal business enterprises. Private, reservation based employment is concentrated in the Construction, Services and Agricultural sectors.

The six Tribal jurisdictions in western Nevada were the source of approximately $61 million in wage and salary income in 1995. This income was derived from household, Tribal government, and Federal agency expenditures and business activities in the service, wholesale and retail trade sectors. Tribal governments alone, generated about $23.7 million in wage and salary income which supported 946 jobs in social services, accounting, public administration, education, health care, law enforcement, construction, finance, skilled trades and telecommunications. Tribal business enterprises such as smoke shops, retail outlets, restaurants, and truck stops generated over $2.3 million in wage and salary income in 1995.

Total household income of the six Tribal jurisdictions in 1995 was $34,359,067 as shown in Table 1. A household is defined by the U.S. Bureau of the Census to be the sum of all persons who occupy a housing unit. A housing unit is a house, an apartment, a mobile home, a group of rooms, or a single room that is occupied as separate living quarters. Household income includes all earned income as well as unearned income and an imputed amount of income reflecting the value of food-stamps, or other transfer payments when applicable.[2]

Table 5 below shows the income and employment impacts that result from the household expenditures of six Tribal jurisdictions in western Nevada. In 1995 these households spent over $25.2 million in the State.

[2]Based on U.S. Census 1990 enumeration or 1995 projections.

Table 5
1995 State-wide Income and Employment Resulting from the Household Expenditures by Six Tribal Jurisdictions in Western Nevada
(Source: The Center for Applied Research, 1997; U.S. Bureau of the Census 1997; U.S. Department of Commerce, 1997.)

Tribal Jurisdiction	Expenditures for Goods and Services in Nevada	Income Generated from Expenditures	Jobs Generated from Expenditures
Fallon	$3,230,410	$2,713,544	108
Pyramid Lake	$6,204,663	$5,211,917	208
Reno-Sparks	$2,831,946	$2,378,835	95
Walker River	$3,742,721	$3,143,886	126
Washoe	$6,731,205	$5,654,212	226
Yerington	$2,547,328	$2,139,756	86
Totals	$25,288,273	$21,242,150	849

B. Tribal Government Expenditures

Generally, business enterprises on reservation/colony lands are owned and operated by the Tribal government. In addition, there are private reservation-based enterprises which are owned and operated by Tribal members. These enterprises account for substantial expenditures made in the Nevada economy for inventory and goods and services. Approximately 20 percent of the total annual reservation/colony employment attributable to reservation/colony based enterprises is provided to non-Indian, non-reservation residents of Nevada. While the exact amount of reservation based employment provided to non-Indian, non-Tribal members can vary considerably from year to year and from reservation and colony, the salient fact is that the six Indian jurisdictions in western Nevada are the source of employment and income for residents throughout the region and the State. It is estimated that over 80 non-Indian, non-Tribal residents of Nevada are provided full- time employment as a result of economic activity within the six Tribal jurisdictions.[3]

[3]Estimates of non-Tribal, non-Indian employment are by the Center for Applied Research and are based on primary research and communication with Tribal government officials.

The six Tribal jurisdictions account for more than $28.1 million per year in expenditures made in Nevada for salaries and purchased goods and services. The 1995 expenditures of the individual Tribal governments are shown in Table 6.

Total Tribal expenditures consist of wage and salary expenditures, and operating expenditures; both the Tribal general fund and federal grant funds have been analyzed.

Table 6 below, shows the State-wide economic impact (income and employment) attributable to the six Tribal jurisdictions. Table 6 shows that the six Tribal jurisdictions are responsible for 946 jobs and over $23.6 million in wage and salary income in the Nevada State economy.

Table 6
1995 State-wide Income and Employment Attributable to Expenditures by Six Tribal Governments in Western Nevada
(Source: The Center for Applied Research, 1997; 1995 Tribal Budget Data.)

Tribal Jurisdiction	Expenditures for Goods and Services in Nevada	Income Generated from Expenditures	Jobs Generated from Expenditures
Fallon	$2,730,124	$2,293,304	92
Pyramid Lake	$8,018,700	$6,735,708	268
Reno-Sparks	$4,920,116	$4,132,897	165
Walker River	$4,518,432	$3,795,483	152
Washoe	$5,529,784	$4,645,019	186
Yerington	$2,475,164	$2,079,138	83
Totals	**$28,192,320**	**$23,681,549**	946

C. Federal Agencies Serving Tribal Governments

Table 7 below, shows the income and employment impacts of the various expenditures by Federal departments and agencies that are directly attributable to the six Tribal jurisdictions. In 1995 these Federal agencies generated 641 jobs and income over $16 million in the State of Nevada.

Table 7
1995 State-wide Income and Employment Generated by Federal Agency Expenditures Attributable to Six Tribal Jurisdictions in Western Nevada
(Source: The Center for Applied Research, 1997. U.S. Consolidated Federal Funds Report, Fiscal Year 1995. U.S. Bureau of the Census, 1997. U.S. Department of Commerce, 1997.)

Federal Department	Expenditures for Goods and Services in Nevada	Income Generated from Expenditures	Jobs Generated from Expenditures
Department of the Interior	$6,484,566	$5,435,728	217
Housing and Urban Development	$4,844,861	$4,061,235	162
Health and Human Services	$2,810,478	$2,355,900	94
Department of Labor	$719,297	$601,683	24
Other*	$4,255,525	$3,601,824	144
Totals	**$19,114,727**	**$16,056,370**	**641**

*Includes U.S. Department of Energy; U.S. Department of Agriculture; Environmental Protection Agency

Table 8 below, provides a summary of the total income and employment impacts attributable to the six Tribal jurisdictions in western Nevada.

Table 8
1995 State-wide Income and Employment Attributed to Six Tribal Jurisdictions in Western Nevada
(Source: 1995 Tribal Budget Data; The Center for Applied Research, 1997; U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997, U.S. Consolidated Federal Funds Report, Fiscal Year 1995.)

Source of Economic Impact	Annual Value of Expenditures	Expenditures Made in Nevada	Created Wage and Salary Income in Nevada	Created Employment in Nevada
Tribal Household Income Expenditures	$31,610,343	$25,288,273	$21,242,150	849
Tribal Government Expenditures	$35,240,400	$28,192,320	$23,681,548	946
Federal Agency Expenditures	$23,893,409	$19,114,727	$16,056,370	641
Totals	**$90,744,152**	**$72,595,320**	**$60,980,068**	**2,436**

IV. The Fiscal Importance of Six Tribal Jurisdictions in Western Nevada

A. State Revenues

The six sovereign Tribal jurisdictions generate tax revenue for the State of Nevada, directly and indirectly. Direct revenue impacts occur when individual Tribal members spend a portion of their household income for goods and services off the reservation or colony. For example, any resident (Indian or non-Indian) of any one of the six Tribal jurisdictions must pay sales tax on taxable items purchased off the reservation/colony. In light of the low degree of diversification in the reservation/colony economies, virtually all consumer expenditures are made in the off-reservation communities in northwestern Nevada (e.g., Reno, Fallon, Carson City).

In addition to this direct tax revenue effect, the consumer expenditures of individual Indian households are an indirect source of tax revenue since their purchases create or "induce" jobs in the Nevada economy and these job holders also make taxable purchases throughout the State. Similar indirect fiscal impacts occur when reservation/colony businesses and Tribal governments purchase goods and services off the reservation. Even though the purchases of Tribal governments are exempt from taxation, the wage and salary income and the jobs created as a result of Tribal government purchases, does lead to a tax revenue impact in the State. Like all government jurisdictions, Tribal governments, while being immune from taxation, nevertheless support jobs (and indirectly, sales tax revenue) in the Nevada economy when they make expenditures throughout the State for goods and services.

Again, like all sovereign governments, Tribal governments utilize tax revenues to defray the cost of governance on the reservation. The tax revenue collected by the six Tribal jurisdictions actually accounted for as little as 5% and no more than 20% of the total cost of the six respective Tribal governments in 1995.

Tax Revenue impacts generated by the six Tribal jurisdictions are shown below in Table 9. The economic activities and overall "presence" of the six Tribal jurisdictions cause the State of Nevada to receive over $4.6 million annually in tax revenues.

Table 9
The 1995 State-wide Fiscal Impact of Six Tribal Jurisdictions in Western Nevada
(Source: The Center for Applied Research, 1997; U.S. Consolidated Federal Funds Report, Fiscal Year 1995; U.S. Bureau of the Census, 1997; U.S. Department of Commerce, 1997; 1995 Tribal Budget Data; Nevada Tax Facts, 1995.)

Source	Taxable Income Generated in Nevada	State Tax Revenue
Tribal Household Income Expenditures	$38,968,218	$2,727,775
Tribal Government Expenditures	$16,577,084	$1,160,396
Federal Agency Expenditures	$11,239,459	$786,762
Totals	$66,784,761	$4,674,933

B. State Expenditures

To determine the State expenditures made expressly for the population of the Tribal jurisdictions in this study, the Center for Applied Research conducted State agency interviews and undertook an analysis of the 1995-1996 Legislative Appropriations Budget and the Department of Taxation 1995 Annual Report. The analysis focused primarily on State agencies where a prominent connection between State services and the Indian population was evident.

The State receives approximately $4.7 million in revenue per year as a result of the six Tribal jurisdictions, about $3.7 million more than it spends for these jurisdictions. Any perception of Tribal jurisdictions being a fiscal "burden" on the State is clearly unfounded.

V. Conclusions

The primary purpose of the forgoing study has been to evaluate the importance of six American Indian Tribal Government jurisdictions to the economy and revenue system of the State of Nevada. Based on the analysis several conclusions can be made.

These six Tribal Government jurisdictions stimulate approximately 2,436 jobs, $61 million in income, and $4.7 in State tax revenue for residents throughout Nevada. These State-wide impacts occur due to:

- $31.6 million in annual personal consumer expenditures that are made by residents of the six Tribal jurisdictions;
- $35.2 million in annual expenditures for goods and services that are made by the six Tribal jurisdiction governments; and
- $23.9 million in annual wage and salary and procurement expenditures that are made by Federal agencies involved in transactions with the six Tribal Governments.
- The State of Nevada enjoys a very cost effective fiscal arrangement with Tribal

governments, wherein the six Tribal Governments collect sales tax and are exempted from excise tax. This enables the Tribal governments to defray some of the cost of governance on the reservations and colonies. The six Tribes provide services to all residents of the jurisdictions, Indian and non-Indian alike. The revenue collected directly by the six Tribes covers only a small portion of the total cost of governance (5% to 20%) that is incurred by the six Tribal governments.

- Many Nevada residents do not appear to be aware of the unique U.S. Constitutional, statutory and case law-based legal status of American Indian Tribal governments and reservations.

A common misconception that is not unique to Nevada, assumes that Tribes are an economic drain on the Nevada economy and revenue system. As this study shows however, Tribes contribute substantially to the State economy. The fact that Tribal jurisdictions collect sales tax and are exempted from excise tax has resulted in a very favorable arrangement for the State government and the citizenry of Nevada. The Tribes utilize the resulting revenue to defray the cost of maintaining infrastructure and services on their respective reservations and colonies, and the cost of Tribal governance. Moreover, the sales tax revenue retained by the Tribal jurisdictions, combined with smoke shop revenues benefitting from State cigarette excise tax exemption, provides only a small portion of the Tribal governments' cost of governance.

Stronger reservation economies would mean even more revenue collections for the State as well as increased employment and income throughout the Nevada economy. The analysis offers a compelling argument for the State to sustain the current Tribal/State fiscal arrangements and economic development efforts of the six Tribal jurisdictions.

Methodology

In this report, we calculate the economic and fiscal effects in Nevada of the six reservations and colonies using the following equations.

(1a) $\Delta Y_{HH} = M(EXP_{HH} * S)$, where

ΔY_{HH} = Income effect of reservation/colony household spending
M = Income multiplier
EXP_{HH} = Reservation/colony household expenditures
S = In-state spending proportion

(1b) $\Delta Y_{TG} = M(EXP_{TG} * K * S)$, where

ΔY_{TG} = Income effect of tribal government spending
EXP_{TG} = Tribal government expenditures
K = Proportion of tribal government spending on salaries and wages

(1c) $\Delta Y_{FED} = M(EXP_{FED} * K * S)$, where

ΔY_{FED} = Income effect of Federal agency spending
EXP_{FED} = Expenditures by Federal agencies

(1d) $\Delta EMP = C(\Delta Y_{HH} + \Delta Y_{TG} - \Delta Y_{FED})/Y_E$, where

ΔEMP = Employment effect of reservation/colony activities
C = Total consumption (proportion of income spent on goods and services)
Y_E = Nevada average earned income

(2) $\Delta TAX = (\Delta Y_{TG} + \Delta Y_{TG} + \Delta Y_{FED}) * S * C_T * R$, where

ΔTAX = Sales tax revenue effect of reservation/colony activities
C_T = Proportion of spending on consumer goods subject to sales tax
R = Sales tax rate

Each of these factors is described in detail in the following sections.

Income Multiplier (M)

This analysis of the impacts of six reservations and colonies on Nevada relies on the theory that spending related to a change in one activity reverberates through the economy, resulting in indirect and induced effects in addition to the direct effects. In this analysis, we show the effects of money spent directly on reservation activities and by reservation residents, as well as the "multiplier" effects that spending has in the broader economy. We use a multiplier of 2.1 (i.e., each dollar spent on the primary activity results in an additional $1.10 in indirect and induced

spending throughout the economy) This multiplier was derived from sectoral multipliers compiled by the U.S. Department of Commerce, Regional Industrial Multiplier System (RIMS II), based on input/output analysis by the Bureau of Economic Analysis. (National Technical Information Service, PB-168-865)

Ethnicity vs. Place Specific Analysis

Because the analysis is concerned with the relationship of two distinct and sovereign geopolitical jurisdictions, the State and Indian reservations, (or more specifically, the economic and fiscal impact that this relationship has on the State's economic and fiscal status), reservation and colony boundaries are more important than the ethnic composition of the respective reservations The analysis is less concerned in other words, with the interaction of two ethnic groups than with the economic and fiscal "flows" across two sovereign jurisdictions. It is clear that, reservations and colonies are logically perceived and defined in terms of their Tribal, ethnic composition, not simply in geopolitical terms But in this analysis it is the nature of a unique economic and fiscal relationship between jurisdictions or places that is being investigated

Because of its focus on BIA defined reservations and colonies, the analysis utilizes, out of necessity, one uniform measure of household income, namely U S Census data for reservations

In-State Spending (S)

The proportion of total spending within the state of Nevada by households, Tribal governments and Federal government agencies in Nevada was estimated at 80%.

Personal Consumption Expenditures by Reservation Residents (EXP_{HH})

The key assumptions that 1) 85% of household income is spent on consumer goods, and 2) that 70% of the personal consumption expenditures made by reservation residents are subject to Nevada sales tax, are based on Bureau of Labor Statistics published data and a description of taxable items contained in "Nevada Tax Facts" (1995), prepared by the Nevada Taxpayers Association, and the Annual Report of the Department of Taxation for 1995.

Reservation Enterprises and Tribal Government Expenditures (EXP_{TG})

Descriptions of Indian owned reservation enterprises were developed from primary and secondary research efforts; this included interviews with Tribal officials, a review of Tribal government published data, and key informant interviews among Tribal, State and county officials. Tribal government expenditures in the State were estimated on the basis of consultation with Tribal government representatives and a review of Tribal budgets for 1995. The proportion of total tribal spending on wages and salaries (K) was estimated at 40%, also based on consultation with tribal government representatives.

Federal Government Expenditures (EXP_{FED})

Estimates of federal government expenditures are based on "Federal Expenditures by State", published by the U S Census Bureau, and direct interviews with federal agency personnel in Nevada, San Francisco, California, and Washington, D C

Consumption (C) and Average Earned Income (Y_e)
The estimated employment effects are derived from income effects by multiplying the total income effect by the consumption proportion (C) and dividing by average earned income in the state of Nevada. The proportion of income spent on goods and services was estimated at 95%, based on long-term consumption and savings patterns in the U.S. Average earned income in the state was estimated at $25,032, based on data from the Nevada Department of Employment Security.

Fiscal Impacts (ΔTAX)
Fiscal impacts are expressed in terms of State revenue and State expenditures in the 1995 fiscal year.

State Expenditures
The enacted State budget for FY '95 was carefully reviewed to determine the magnitude of State expenditures attributable to the six Tribal jurisdictions.

State Revenues
The Center's revenue analysis focused on the basic components of the Nevada State Combined Sales and Use Tax. The 1995 maximum combined rate is 7.25% which occurs in counties that have enacted the county option tax; in an attempt to utilize conservative methods the Center applied a 7.0% combined rate (R). Total sales tax revenue attributed to the six Tribal jurisdictions in 1995 at 7.0% is reported in Table 9 as $4,674,933 million.

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Supreme Court, U.S.
FILED
SEP 26 1997
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No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,
a federally recognized Indian Tribe,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,

Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Appeals

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, LOUISIANA, MASSACHUSETTS, MICHIGAN, MONTANA, NEW HAMPSHIRE, NEW YORK, UTAH, VERMONT AND WISCONSIN IN SUPPORT OF RESPONDENT

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INTRODUCTION

The States of South Dakota, Alaska, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, Utah, Vermont and Wisconsin, respectfully submit a brief amicus curiae in support of Respondent pursuant to Supreme Court Rule 37.

INTEREST OF AMICI STATES

This case differs substantially from other Indian law cases in which the interest of the States arises from the *presence* of Indian country. In this case, the interest of the Amici States lies in ensuring equal treatment of commercial business enterprises conducted by tribes when those enterprises move *beyond* Indian country and in ensuring that tribes may be held directly accountable for compliance with generally applicable, nondiscriminatory state laws with respect to such activities. The States thus have a strong interest in allowing their courts jurisdiction over Indian commercial enterprises when those commercial enterprises move beyond reservation boundaries, just as the state has an interest in assuring that other commercial enterprises which commit civil wrongs are subject to the civil jurisdiction of the state courts. They also have a strong interest in being able to enforce their and their local governmental subdivisions' laws against tribes, which otherwise apply to tribal non-Indian country transactions or activities, without either the need to resort to official capacity suits where prospective relief is at issue or to face the potential practical inability to obtain retroactive relief.

Petitioner has forthrightly argued that, if its claim is sustained here, an Indian tribe with a reservation in one state has sovereign immunity "Anywhere In The United States." *See* Brief for Petitioner at 26. According to the Bureau of Indian Affairs, there are "more than 550 federally recognized Tribes in the United States, including 223 village groups in Alaska." U.S. Department of the Interior, Bureau of Indian Affairs, On the Web, p. 3. Each of these tribes, under the theory offered by Petitioner and the United States, has unfettered sovereign immunity to operate commercially in each of the fifty states and could, under their theory, commit torts, breach contracts, and violate state law generally without recourse for the States as against the offending tribe itself. This result is unacceptable practically and unjustified doctrinally.

SUMMARY OF ARGUMENT

The Petitioner and the United States seek here to have this Court expand the doctrine of tribal sovereign immunity to off-reservation commercial transactions of tribes. The demand is without legal basis. Neither the tribe nor the United States cites any basis in the common law of the States or in international law to support this expansion of tribal sovereign immunity. Indeed, States are not immune from suit in sister states even when conducting governmental business, and a foreign state does not possess immunity from suit regarding its commercial transactions within the United States by virtue of federal law.

The claim of the Petitioner and the United States is, moreover, directly contrary to this Court's precedent which holds that off-reservation commercial enterprises of a tribe are not immune from state taxation.

The United States and the Petitioner also downplay the significance of this litigation. In fact, the legal claim made here is that each of the 320 federally recognized tribes may conduct commercial enterprises in each of the fifty states without fear of incurring a civil liability. The claim effectively extends not only to contractual relations but also to tort actions and violations of state law generally. As a result, the Petitioner and the United States invite this Court to endorse the establishment of tiny enclaves of immunity from state law created by each of the 320 tribes in each of the fifty states.

The States submit that public policy considerations strongly argue against the proposed unprincipled extension of tribal sovereign immunity to off-reservation commercial transactions.

ARGUMENT

I.

NEITHER PETITIONER NOR THE UNITED STATES HAS DEMONSTRATED THAT THE TRIBES POSSESSED SOVEREIGN IMMUNITY BEYOND INDIAN COUNTRY AS A MATTER OF COMMON LAW.

The argument of Petitioner and the United States before this Court is simply that because the tribes have always had sovereign immunity off-reservation and because Congress has not seen fit to divest the tribes of

that attribute, it must still exist. The fundamental flaw in their argument, however, is that neither common law nor Congress has ever recognized such immunity in favor of Indian tribes. This conclusion flows ineluctably from *Nevada v. Hall*, 440 U.S. 410, 414 (1979), where the Court explained that the doctrine of sovereign immunity "is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." The doctrine of sovereign immunity, the Court explained, protected the "immunity of a truly independent sovereign from suit in its own courts." *Id.* That concept had its origins in the feudal system in which each petty lord was subject to suit in the courts of a higher lord; since there was no lord higher than the king, the king was necessarily immune from suit.[1] Here, however, the issue is whether Petitioner, or tribes in general, has sovereign immunity from suits in the courts of another sovereign with respect to conduct admittedly subject to the latter's regulation.

A. There Is No Substantial Basis in International Law to Recognize Sovereign Immunity for Off-Reservation Commercial Transactions.

In seeking to discover the basis for the tribal and federal claim to sovereign immunity for off-reservation commercial transactions, we first turn to transactions of foreign nations in federal courts. In so doing, we recognize that Petitioner and the United States correctly deny

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[1] The idea that "the King could do no wrong" also supported the immunity of the king in his own courts. *Hall*, 440 U.S. at 415.

that the tribes can be classified as "foreign nations." Nonetheless, because they have failed to reveal the source of their theory with regard to the origin of off-reservation immunity, this Court's treatment of sovereign immunity claims by foreign nations provides a useful backdrop in answering the question presented.

This Court noted in *Hall*, 440 U.S. at 416, that the idea that a sovereign could not be sued in its own courts did not provide "support for a claim of immunity in *another sovereign's* courts." (Emphasis added.) The source of sovereign immunity in the courts of another sovereign must be found "either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.*

In *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 145-146 (1813), this Court found that the United States had, in fact, agreed as a matter of comity not to subject a foreign sovereign's warship to the jurisdiction of the federal courts. This Court also noted that the person of a sovereign would be immune from arrest or detention within a foreign territory, *id.* at 137, as would the foreign ministers of that country or the troops of a foreign sovereign passing through the country with the permission of the host sovereign. *Id.* at 138-139. The Court noted, however, that there might well be a distinction with regard to a "prince" who conducts commerce in a foreign country indicating the possibility that such a prince might well be subject to the jurisdiction of the United States courts.

> Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of

> the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

Id.

Despite the implications of this passage from the *Schooner Exchange*, this Court a century later in *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926), found that because the government of Italy owned a commercial vessel, the vessel was immune from suit in the United States courts. As described by Professor Lowenfeld, the case

> rested entirely on the Supreme Court's understanding of international law and precedent, without any reference to considerations of foreign policy or the desires of the United States Government. Indeed, in the *Pesaro* case itself, the State Department argued that immunity should not be granted to a commercial vessel in a claim arising out of a commercial transaction, but the Justice Department disagreed and declined to submit the State Department's opinion to the Court.

Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev.

901, 904 (1969). Two decades later, the Court affirmed the *Pesaro* holding without reference to international law

> solely on the basis that the State Department's certificate and request "must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."

Id. at 905 (discussing *Ex Parte Peru*, 318 U.S. 578 (1943)).

In 1952, matters took a new turn. The State Department concluded that foreign sovereigns should *not* be immune from suit "in cases involving what it called 'private' or 'non-public' acts as contrasted with 'sovereign acts.' " *Id.* at 906. Essentially, the new approach, captured in the "Tate Letter" of May 19, 1952, responded to the

> widespread and increasing practice on the part of governments of engaging in commercial activities. . . .

44 N.Y.U. L. Rev. at 906 (quoting letter of Jack B. Tate of May 19, 1952). The practice then became for the State Department to advise the courts on whether to grant sovereign immunity based upon whether the transaction was a sovereign or public act or a private act. Therefore, from 1952 through 1976, the official policy of the State Department was that commercial transactions entered into by foreign powers were generally not entitled to sovereign immunity.

In 1976, the Foreign Sovereign Immunities Act of 1976 was enacted. The Act provides generally for actions against a foreign state based upon a commercial activity

carried on in the United States by the foreign state. 28 U.S.C. § 1605(a)(2). Sovereign immunity would not be recognized in such situations. It also provided for the waiver of a foreign state's immunity "by implication." *Id.* at § 1605(a)(1).

The history of a foreign sovereign's immunity from commercial transactions in United States courts thus is not consistent. It begins with an implication that such commercial transactions might subject the sovereign to the jurisdiction of United States courts, an implication repudiated a century later and then given new life by the State Department and finally Congress. The law of the United States is now clearly that foreign sovereigns are subject to jurisdiction for their commercial activities within the United States. The foregoing discussion reveals why Petitioner and the United States have adamantly declared that Indian tribes are not "foreign nations" for the purpose of sovereign immunity. *See* Brief for Petitioner at 26; Brief for the United States as Amicus Curiae Supporting Petitioner at 8. Quite clearly, this body of law does not support recognition by this Court of off-reservation sovereign immunity for commercial transactions.

B. Indian Tribes Cannot Claim Sovereign Immunity as "States."

Both Petitioner and the United States deny that tribes should be treated as "states" for the purpose of sovereign immunity law. *See* Brief for Petitioner at 24-25, 30; Brief for the United States at 8. They are forced to this position by *Nevada v. Hall*. In *Hall*, this Court found that whether

California recognized the sovereign immunity of Nevada with regard to a tort committed by a Nevada employee within California depended upon whether California desired to recognize that sovereign immunity as a matter of "comity." *See* 440 U.S. at 418, 425-427. The Court rejected the argument that California was bound by the Constitution to grant sovereign immunity to Nevada. It also sent a warning that the right of self-government might be implicated by an opposite conclusion. This Court noted:

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

Id. at 426. Plainly, treatment of Petitioner as a State in view of this Court's jurisprudence would result in affirmance of the judgment below.

C. There Is No Basis in American Law to Require States to Grant Sovereign Immunity to Tribes for Their Off-Reservation Commercial Activities.

It would be anomalous to recognize sovereign immunity for off-reservation commercial activities in view of the treatment of foreign nations and States by this Court and by Congress. The tribes certainly do not possess more "sovereignty" than do foreign nations. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (the Framers did not have tribes "in view" when extending federal

court jurisdiction to controversies between States or citizens thereof and foreign states, citizens or subjects). The States' position is protected by the very text of the Constitution itself, together with the Tenth Amendment. *Cf. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality op.) (tribal inherent authority is less expansive than local government police powers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-193 (1989) (tribes are not States).[2] Tribal power, on the other hand, is subject to complete defeasance by the United States. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Petitioner and the United States have failed to explain satisfactorily why tribes should have the benefit of the application of principles derived from feudal law in such a way as to confer tribes with a special benefit largely without precedent in the treatment of that feudal law by American courts.

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[2] The unique status of the United States and States under the Constitution is also relevant to the issue, not presented here, whether they are immune from unconsented suit in tribal court. Both federal and state governments have so argued successfully in lower federal courts. *See United States v. Yakima Tribal Court*, 806 F.2d 853, 860-61 (9th Cir. 1986); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed*, No. 96-35766 (July 18, 1996). As to States, finding such jurisdiction runs counter to their immunity from suit under the Eleventh Amendment in the courts of the tribes' immediate sovereign and would effectively expose them to the unreviewable authority of an extraconstitutional entity – authority that, for example, could be used to regulate States in a manner not permissible even to the federal government by virtue of the Tenth Amendment.

II.

PRECEDENT OF THIS COURT INDICATES THAT THE STATES MAY ENTERTAIN SUITS AGAINST INDIAN TRIBES ENGAGED IN COMMERCIAL ACTIVITIES OFF THE RESERVATION.

The essence of Petitioner and the federal government's argument, as demonstrated above, is not based on any historical analysis of the law of sovereign immunity as it relates particularly to commercial enterprises of Indian tribes or other entities. Instead, their theory proceeds upon the assumption that "the Constitution granted the United States the *sole power* to regulate relations with the Tribes. . . . " Brief for the United States at 12 (emphasis added); *see also* Brief for Petitioner at 30.

The United States thus contends that the States may not, consistent with the Constitution, exercise *any* jurisdiction over a private off-reservation individual's relationship with an Indian tribe. This Court has explicitly rejected this assumption. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-148 (1973), this Court held:

> At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."

The Court added that the states *did* have jurisdiction over tribal activities occurring off reservation, absent "express federal law to the contrary." *Id.* at 148. The Court stated:

> But tribal activities conducted outside the reservation present different considerations.

> authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake [v. Egan*, 369 U.S. 60, 75 (1962)]. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Id. at 148-149. The Court accordingly rejected the argument that the commerce clause, *see id.* at 159, 161 (Douglas, J., dissenting), prohibited New Mexico from taxing a commercial enterprise, there a ski resort, operated by a tribe on off-reservation land leased from the federal government.

Mescalero Apache Tribe thus establishes that the States in fact do have jurisdiction over commercial enterprises of tribes off the reservation, and this Court has consistently adhered to that decision. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 2223 (1995) (principle that Indians and tribes are generally immune from state taxation "does not operate outside Indian country"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n.11 (1980). The United States, to be sure, admits that *Mescalero Apache Tribe* recognizes the authority of the state to tax commercial activities of tribes operating outside of Indian country. However, it argues that, although the States may have the right to "demand compliance with state law," Brief for the United States at 12, Petitioner's sovereign immunity nonetheless protects it from a suit to compel compliance with such law. The Government surprisingly relies upon *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991), for this proposition.

In *Potawatomi Tribe*, Oklahoma argued that a tribe should not be able to invoke sovereign immunity to prevent the collection of cigarette taxes because the cigarette sales did not occur on a "reservation." *Potawatomi Tribe*, 498 U.S. at 511. The Court's opinion extensively reviewed the question of sovereign immunity of the tribes. *Id.* at 508-510. The Court, in finding tribal immunity from liability for uncollected taxes, nevertheless did not simply state that sovereign immunity operated regardless of the transaction's locus. Instead, the Court quoted *Mescalero Apache Tribe* to the effect that state laws *could* be applied to a ski resort outside a reservation's boundaries operated by the tribe and that " 'absent express federal law to the contrary, Indians going beyond reservation boundaries have generally held subject to nondiscriminatory state law unless otherwise applicable to all citizens of the state.' " *Id.* at 511 (quoting *Mescalero Apache Tribe*, 411 U.S. at 148-149). *Mescalero Apache Tribe* was deemed to be not applicable *not because sovereign immunity shielded the tribe with regard to its off-reservation conduct but because the trust land in question had been " 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes."* *Potawatomi Tribe*, 498 U.S. at 511. *Potawatomi Tribe* says nothing about the suability of tribes for off-reservation activities where, unlike within their reservations, they are amenable to the full range of state regulatory and, by necessary inference, state adjudicatory jurisdiction absent contrary federal statutory or treaty provisions.

Petitioner and the United States' position, logically extended, consequently requires this Court to conclude that, while a State may regulate off-reservation conduct of tribes, it may not enforce that regulation directly

against them. That position makes no legal sense in view of the fact that authority to regulate a party's activity necessarily carries with it the right to compel prospective compliance or to seek a remedy, perhaps monetary in nature, for past violations unless the right to regulate is to be reduced to a meaningless abstraction. *See Rice v. Rehner*, 463 U.S. 713, 732 (1983); *Fort Belknap Indian Comm'y v. Mazurek*, 43 F.3d 428, 433-434 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 49 (1995). *Cf. Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997). Petitioner and the United States' effort at separating the notion of tribal sovereign immunity from that of a State's authority to regulate the underlying conduct cannot be credited without creating an anomalous distinction between the power to regulate and the power to enforce that regulation.

One further argument must be addressed. Petitioner argues that sovereign immunity ought to be recognized in this case in furtherance of the "unique trust responsibility" of the United States to tribes. Brief for Petitioner at 27. A similar argument was made and rejected in *Mescalero Apache Tribe*. There it was argued that the Indian Reorganization Act required an off-reservation tribal business on federal land to be treated as a "federal instrumentality." This Court recognized that a tribe "taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." 411 U.S. at 151 (footnote omitted). This did not convert the tribe to an arm of the federal government, however, for the intent and purpose of the Reorganization Act was "' to rehabilitate the Indian's economic life and to give him a chance to develop the

initiative destroyed by a century of oppression and paternalism.' " *Id.* at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)). Further, the Court found that the aim of the Indian Reorganization Act was "to disentangle the tribes from the official bureaucracy." *Mescalero Apache Tribe*, 411 U.S. at 153. By determining that the tribe's off-reservation commercial enterprises would not be treated as arms of the federal government, this Court embraced the concept that the Indian Reorganization Act should be interpreted to disentangle the Indian tribes from federal law when acting off-reservation, to remove the vestiges of paternalism in such cases, and to enable Indians to "enter the white world on a footing of equal competition." *Id.* at 152 (quoting 78 Cong. Rec. 11,732 (1934)); *see also Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578-581 (1928), *quoted in Mescalero Apache Tribe*, 411 U.S. at 153-155; *see generally* Bradley A. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240-52 (1991) (reviewing legislative history of Indian Reorganization Act). In short, federal policy announced in the Indian Reorganization Act does not support off-reservation sovereign immunity for tribal commercial enterprises but supports the competition of such tribes in the greater commercial world, on a basis of equal competition.[3]

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[3] The argument has been made that Congress addressed the problem when it allowed tribes to create corporations under § 477 which could be sued. *Mescalero Apache Tribe* answers this argument, stating that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." 411 U.S. at 157 n.13.

III.

POLICY REASONS MILITATE AGAINST THE RECOGNITION OF OFF-RESERVATION SOVEREIGN IMMUNITY WITH REGARD TO TRIBAL COMMERCIAL ENTERPRISES.

Petitioner and the United States argue, as we understand it, that it is good public policy for this Court to explicitly embrace the legal theory that each of the 320 Indian tribes in the United States[4] may conduct commercial enterprises off reservation without fear of incurring a civil liability in the courts of any of the fifty states.

Some of the description of the enormity of what Petitioner and the United States suggest is in order. First, there are over 320 recognized Indian tribes. As of December 1996, 184 tribes were operating between 275 and 280 bingo halls or casinos. Carroll, *National Gambling Impact Study Commission, What Hand Will They Deal Tribes?* XII American Indian Report 12, 13 (Aug. 1997). Some of these operations generate very substantial income for the tribes. The tribes, appropriately so, now seek to invest their funds in other enterprises. A recent article describes the Sault Ste. Marie Tribe as making a "respectable profit from their casinos, which posted about $267 million in gross revenues in 1995." Carroll, *Cashing in on Gaming Revenue, Tribes Use Cash From Casinos and Bingo Halls to Build Economy,* XII American Indian Report 16 (Aug. 1997). The article reports that the Sault Ste. Marie conducted "seventeen non-gaming businesses" in 1995. *Id.*

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[4] Perhaps each of the 200 plus Alaskan villages also should be added to this total, although neither Petitioner nor the United States discloses its position on that point.

Among these businesses were a construction company, a professional cleaning service, a "successful development company," a chain of hotels, and a joint venture involving the production of driveshafts. *Id.* at 17. (The article does not directly discuss the "reservation" or "Indian country" status of the lands on which these enterprises are located. Some of the lands appear to have such status while others, e.g., a hotel in Grand Rapids, do not.)

The question therefore becomes whether, in the investment of significant sums in various enterprises, the off-reservation commercial enterprises should then be subject to sovereign immunity. A tribe, of course, is not confined to commercial enterprises in its home state or area. Indeed, the business climate of another section of the country may well make it advisable to invest far from the reservation. The business options open to each one of the 320 tribes, perhaps in combination with other financial interests, are virtually limitless. Petitioner and the United States accordingly now ask this Court to issue an invitation to each of the federal tribes to establish commercial enterprises throughout the United States, even in states in which no "Indian country" now or has ever existed, and to sanction in advance tribal immunity from lawsuit for their activities.

Petitioner and the United States argue that a commercial enterprise dealing with a tribe can protect itself through careful commercial practices. *See, e.g.*, Brief for the United States at 27. And the latter suggests that a person or entity

> may simply refuse to deal with the sovereign that will not consent to suit, if it deems the likely gain not worth the risk or inconvenience

> (as it might, for example, if the sovereign had developed a reputation for failing to honor its obligations).

Id. This position ignores two important considerations. First, many of those dealing with Indian tribes in each of the fifty states will not possess the sophistication to recognize that an Indian tribe, or a tribal enterprise partaking of a tribe's immunity, is situated differently from other persons with whom they deal in the ordinary course of business. Second, the immunity endorsed by the United States is not limited to consensual commercial transactions; it encompasses any form of legal claim, whether by a private party in the form of tort action for negligence or a governmental entity seeking compliance with, and monetary relief for violation of, state law.

In sum, accepting Petitioner and the United States' view of tribal immunity means that tiny enclaves of immunity from state law against tribes qua tribes may be set up in each of the States by each of the 320 tribes. Each of these enterprises will be able to assert immunity from actions for breach of contract or for personal injury for damages. Each will be similarly immune for actions against their commercial enterprises with regard to wrongful termination of employment, labor disputes, and state discrimination suits.[5] The policy consequences of

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[5] This Court suggested in *Potawatomi Tribe*, 498 U.S. at 514, the applicability of remedial principles developed under *Ex parte Young*, 209 U.S. 123 (1908), with respect to tribal officers even as to on-reservation transactions. It also left open the possibility that retroactive relief might be available against them. *Potawatomi Tribe*, 498 U.S. at 514. Lower federal courts have applied the *Young* rationale to sustain awards of prospective relief in various contexts where *federal law*

Petitioner and the United States' position are therefore quite significant. *See generally* Comment, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988); submission of Lawrence Long, Chief Deputy Attorney General, State of South Dakota, S. Hrg. 104-694 (Sept. 24, 1996), pp. 88-130. Coupled with the unprincipled nature of the proposed extension of tribal sovereign immunity to off-reservation conduct otherwise subject to state regulation, these considerations counsel strongly in favor of affirming the judgment below.

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limitations on tribal authority were arguably exceeded. *See, e.g., Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050-51 (5th Cir. 1995); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comm'y*, 991 F.2d 458, 460 (8th Cir. 1993). Whether retroactive relief is available in such a situation – at least where the relief is effectively against the involved tribe – appears undecided. Moreover, exploration in federal court of *Potawatomi Tribe*'s implications with respect to retroactive relief in the context of a simple breach of contract claim such as that here, garden variety tortious conduct, or mere violation of state law has been made difficult because of the ordinary need to establish jurisdiction under 28 U.S.C. § 1331. *See, e.g., Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) (no federal question jurisdiction where alleged breach of fiduciary duty arose under tribal, not federal, law); *Whiteco Metrocom Div. v. Yankton Sioux Tribe*, 902 F. Supp. 199, 202 (D.S.D. 1995) (breach of contract claim provided insufficient jurisdictional basis). The upshot is that the availability of *Young*-based prospective relief against tribal officers may be severely limited and, even if retroactive relief is assumed to be capable of being awarded against an officer or employee in his personal capacity, such relief may well prove unavailing as a practical matter because of the absence of either indemnification from a tribe or insurance.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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March 4, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, Paris Fire Extinguisher Co., Inc., has done business with the Choctaw Nation of Oklahoma for the last eight years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships with businesses outside the tribe. This would have direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Gary Cook

Gary Cook
President



GLOWSKI & COMPANY

P O Box 1502
Edmond, Oklahoma 73083-1502

Phone 405-943-4193

March 2, 1998

Senator Ben Nighthorse Campbell
Chairman
Senate Committee on Indian Affairs
Washington, D.C. 20510-6450

RE: Business Relationships with Non-Indian Businesses

Dear Senator Campbell

Our company, Glowski & Company, has done business with the Choctaw Nation of Oklahoma for the last two (2) years. We have an excellent business relationship with the tribe.

We do a large volume of business with Choctaw Nation and have never had any problems with late payments or unpaid invoices. The issue of sovereign immunity has never interrupted or impeded our business relationship with Choctaw Nation.

The loss of sovereign immunity would cripple the Choctaw tribe's ability to govern itself and could jeopardize its business ventures and relationships outside the tribe. This would have a direct impact economically on businesses such as ours that have commercial interests with Choctaw Nation.

We urge you to support the Choctaw Nation's stand on sovereign immunity, as we do, so that we can continue our business relationship with them.

Sincerely,

Joe E. Glowski
Owner
Glowski & Company

JEG:lcg



Roland J. Harris, L.S.
Chairman, Mohegan Tribal Council

March 27, 1998

The Honorable Ben Nighthorse Campbell
United States Senate
Washington, DC 20510

Dear Senator Campbell:

I recently had the opportunity to attend the March 11, 1998 Senate Committee on Indian Affairs hearing on Tribal Government Sovereign Immunity. I was troubled to hear the comments made by your colleagues Senator Gorton and Representative Ernest Istook.

I can only assume that these two obviously well educated men have not seen first hand the great benefit Tribal governments are having around the United States. I believe that this lack of experience and a less than complete understanding of our historic sovereign rights must have led to their comments and potentially destructive legislation. It is my hope that you will share my letter with your colleagues so that they may all have the opportunity to hear even one example of how Indian Tribes are working well with, and benefiting, their non-native neighbors.

The Mohegan Tribe of Indians of Connecticut is one of two federally recognized Tribes in Connecticut. Both of Connecticut's Tribes have begun to raise tax dollars through governmental gaming and other business ventures. We currently directly employ over 18,000 people in our enterprises. In a region greatly affected by the end of the cold war, these jobs were greatly needed by the people in this area. The site of our reservation and casino is on the abandoned site of the former United Nuclear Corporation, a true example of swords for plowshares.

The Mohegan and Mashantucket Tribes have entered into compacts with the State of Connecticut and collect State sales taxes on items sold on the reservation to non-natives. We also pay to the state 25% of our revenue from slot machines. In 1997, $240,000,000 was remitted to Connecticut's general fund. These monies, 12% of the Connecticut's entire budget, has greatly reduced the burden on its taxpayers.

P.O. Box 488 • Uncasville, CT 06382 • Tel. 860-848-6100 • Fax: 860-848-6153

The Mohegan people have always felt that their relationship with their neighbors is critical to our being able to jointly work, live and prosper. As such, the Mohegan Tribe donated to our surrounding town $3,000,000 to upgrade their water system and makes an annual payment of $500,000 as a payment in lieu of taxes. The Tribe also provides services to the town including emergency medical support and fire suppression as a gesture of good will. We have also budgeted another $500,000 for charitable contributions in the county. It is because of this type of community spirit that Senator Christopher Dodd has called us "one of Connecticut's best corporate citizens."

The accomplishment that The Mohegan Tribe is most proud of has been our ability to provide for our people and become truly self-sufficient and self-determined. We are finally able to provide for our people what the United States could not for so very long. Our children are being educated and our elderly are well provided for in their sunset years. We have taken our people off welfare and out of Section 8 housing and allowed them to have the respect for themselves that they deserve.

While we have been relieving the burden on federal programs so that others may have opportunity, The Mohegan Nation has also made another very personal decision. We have decided to return federal grant money to the United States and not to seek any future grant monies. This is a very difficult decision for any Tribe to make, in light of injustices we have endured, but one we feel strongly about. The Mohegans are proud people and believe to be truly self-determined and self-sufficient and feel we should finance our own programs now that we are able.

We, the leaders in Indian Country, are working very hard to impress upon the leadership of the United States, the rights and responsibilities we hold under Tribal sovereignty. It is a lasting dignity our people have kept and treasured.

I know how busy your schedule is, but I invite you to bring anyone, you think will benefit, to come and visit Mohegan. I am confident that meeting our members and seeing what we have accomplished will help anyone understand the special and historic relationship we have with the United States. I am sure the Governor John Rowland would be happy to speak on how well Connecticut has benefited from our governments working together.

Sincerely,

Roland J. Harris
Chairman
Mohegan Tribal Council

RJH:da

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
PO BOX 268 • SISSETON, SD 57262 • TELEPHONE: (605) 698-3998 OR (605) 698-3787 • FAX: (605) 698-3316

Bradford R. Keeler
(Cherokee of Oklahoma)
President

Jerry Flute
Dakotah(Sisseton-Wahpeton)
Executive Director

March 31, 1998

Senator Ben Nighthorse Campbell
380 Senate Russell Office Building
Washington, DC 20510-0605

Dear Senator Nighthorse Campbell:

As President of the Association on American Indian Affairs, a 75 year old Indian advocacy organization headquartered in South Dakota, I am writing to express our strong opposition to S. 1691.

S. 1691 has great potential to lead to the de facto termination of tribes. As has been well documented, the termination era of the 1950s was disastrous for Indian people and it is inconceivable to us that such a policy would be seriously entertained by Congress.

As you know, tribal governments have inherent sovereignty which predates the establishment of the United States. Although the courts and Congress have partially limited the exercise of that sovereignty, one aspect of sovereignty which has been repeatedly upheld by the United States Supreme Court has been immunity from suit. Sovereign immunity is an integral aspect of tribal sovereignty and essential to effective tribal self-government. As the Court recognized in Santa Clara Pueblo v. Martinez, waiver of tribal immunity "would...impose serious financial burdens on already 'financially' disadvantaged tribes."

Thus, any waiver of tribal sovereign immunity by Congress would be troublesome. Yet S. 1691 is not just "any waiver". It is crafted in a manner clearly designed to directly assault the very foundations of tribal governments and tribal sovereignty. Indeed, its very purpose is to transform tribes into "private, voluntary

associations" -- or, in other words, to terminate tribal existence. Section 9 of S. 1691 would give state courts complete civil jurisdiction over Indian tribes. Any claim against a tribe arising from a contract, tort or any federal or state law would be within the jurisdiction of the state courts. The tribe would be treated exactly like a private individual or corporation except for certain restrictions on interest and punitive damages. A state court -- hardly a "neutral" forum for a tribe -- could enjoin tribal government activities or issue a damage award which would bankrupt a tribal government. This proposal would reverse two centuries of Indian law and policy which has recognized that tribes have the right to govern themselves free from state interference. Aside from directly terminating tribes, it is difficult to conceive of a proposal which would be more of a threat to tribal existence.

The provisions providing for federal jurisdiction over claims against Indian tribes and the concomitant waiver of tribal sovereign immunity -- while more in accord with the historic federal-tribal relationship -- would still be potentially devastating to tribes. Although the federal court might be a more "neutral" forum, the potential for direct interference with tribal governmental activities or ruinous financial impact upon a tribe would still be present.

Indeed, it is incredible, given that tribal governments in general are the governments least able to afford to be subjected to such liability, that the scope of the sovereign immunity waiver for tort claims in S. 1691 far exceeds the typical state waiver of immunity. Other than the limits on interest and punitive damages, there would be no limits on tribal liability. To the contrary, many states have placed statutory caps upon their liability and retained total immunity for a wide variety of governmental actions.

Moreover, states have waived their sovereign immunity only for suits in their own courts and have sometimes created special forums for such suits to be heard. If S. 1691 were enacted, tribes would be subjected to suit in foreign courts not of their own choosing.

Thus, the S. 1691 approach to tort claims is a Draconian solution that could destroy tribal governments. Most reservations continue to have unmet needs that far exceed those of non-Indian communities. To place tribal governments in a position where their limited assets could be depleted in a single court case or series of cases would be unconscionable. No reasonable sovereign would place itself in such a position. Each tribe must be permitted to make the determination as to whether to limit its sovereign immunity based upon its own individual needs and circumstances; and where a tribe determines to waive its immunity from suit, such law suits should be brought in tribal court and not a court outside of the tribe's jurisdiction.

In the contract area, the so-called problems cited by the sponsor for the introduction of the bill are simply illusory. The issue of sovereign immunity is typically part of the negotiations pertaining to any contract with a tribe and creative approaches to protect contract parties are worked out on a case-by-case basis. If they cannot be worked out, there is no contract. Thus, there is no need for Congress to create a federal court remedy for contract disputes.

It should be noted that there are other less drastic remedies which may be or could be made available to aggrieved parties, as opposed to waiving tribal sovereign immunity and providing for federal court review of contract and tort claims against tribes. Tribal officers acting outside the scope of their authority are not currently protected by sovereign immunity. Moreover, Congress could take action to provide tribes with better access to insurance coverage which could be available to claimants without impairing sovereign immunity. Finally, rather than create new federal court remedies, Congress could and should take action to fully fund the Indian Tribal Justice Act which would provide tribes with resources that they need to continue the great progress that has been made in strengthening tribal courts. AAIA urges Congress to explore such measured responses to the problems identified and to eschew the extreme approach in S. 1691.

Finally, in terms of the state tax collection issue, we believe that providing states with a Federal court remedy will undermine the creative problem solving that is taking place between tribes and states on this issue. In some places, states are permitting tribes to retain all tax revenues or are declining to seek imposition of state taxes on reservation. In other places, states and tribes are splitting revenues or tribes are paying a portion of the potential tax and retaining the discretion as to whether to impose the remainder of the tax as a tribal tax. The one size fits all approach of S. 1691 would have great potential to destroy these arrangements. This is unwise and unnecessary especially since states have alternative means for collecting these taxes if tribal-state agreements cannot be reached -- for example, by imposing the tax on wholesalers selling to the tribe. If Congress wants to act in this area, it should create an incentive for tribal-state agreements on this issue, rather than tilting the playing field in favor of the states and creating a disincentive for tribes and states to seek creative solutions to their differences on this issue. We would remind Congress that states are protected against tribal law suits because of their sovereign immunity. See Seminole Tribe of Fla. v. Florida and Idaho v. Coeur d-Alene Tribe of Idaho. Thus, it is not an anomaly that the state must seek to achieve its legitimate goal of tax collection indirectly because of sovereign immunity. Tribes are in exactly the same position in terms of pursuing their legitimate goals against the state.

In short, S. 1`691 is one of the most virulently anti-Indian pieces of legislation which has been introduced in decades. It should be rejected in its entirety.

Thank you for considering these comments.

Respectfully submitted,

Bradford R. Keeler
President

NATIONAL AMERICAN INDIAN
COURT JUDGES ASSOCIATION

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NEIL T. FLORES
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Parker, AZ
Director

March 19, 1998

Honorable Ben Nighthorse Campbell
Chairman
United States Senate Committee
on Indian Affairs
Washington, DC 20510-6450

Re: Formal Views of NAICJA on S.1691

Dear Senator Nighthorse Campbell:

Thank you for your letter dated March 13, 1998. We spent a great deal of time at our Annual Meeting discussing the very issues you raised in your letter Per your request, please find NAICJA Resolution 98-02 which sets forth NAICJA's formal views concerning S.1691, entitled the "Indian Equal Justice Act." In short, we view this bill as an unwarranted and egregious infringement on tribal sovereignty, self-government and jurisdiction, in direct contravention of tribal treaty rights, the federal trust responsibility, federal law and federal legislative intent.

We are extremely troubled by the lack of factual support for the allegations Senator Gorton makes in the findings of S.1691. We are working in conjunction with NCAI to gather statistics on the operation and fairness of tribal courts, as well as, to document the number of tribal governments which have already waived tribal sovereign immunity for a wide variety of causes of action, ranging from tort claims to civil rights violations.

I had the opportunity to hear Attorney General Janet Reno introduce the Indian Country Law Enforcement Initiative to the Impact Week gathering of the United South and Eastern Tribes on February 2, 1998. While we are encouraged by the inclusion of the $10 million for tribal courts, it is an extremely small sum when compared to the whole initiative. There also already appears to be specific projects earmarked for this funding, such as intertribal appellate courts in California (we do not begrudge the California tribes this need, however). The critical need of tribal courts is for day to day operational funds, not new special Department of Justice projects.

It has been heartbreaking to tribal justice systems that the 1993 Tribal Justice Act, which would provide $50 million for each of five years, has been sitting unfunded for the past five years and no move is afoot to fund this most important law. NAICJA is in the process of completing an updated survey of the needs of

tribal justice systems. This survey should be completed by the end of this month.

Tribal courts have the broadest jurisdiction of all jurisdictions in the United States. Thus, it is simply amazing how much these tribal systems have been able to provide in terms of justice services given their shoestring budgets when compared to the funding received by state and federal courts. As tribal judges, we are extremely offended by the baseless accusation that the tribal courts are not fair. We are bound to uphold tribal law and to administer fair and just proceedings, just as state and federal judges are. Senator Gorton has failed to substantiate this allegation and we believe he would be hard pressed to.

NAICJA intends to monitor S.1691 very closely and would be willing to have representatives testify with regard to the impact of the bill were it to be enacted if such a request were made of us. We hope that the Committee will see that this bill would abrogate the inherent sovereign authority of an Indian tribe to make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959).

We appreciate the opportunity to address these issues with you and the Committee. As we gather our information and statistics, we will forward the results to you as quickly as we are able. Should you require additional information or have any questions, please do not hesitate to contact me at (860) 572-6156.

Woli won.

Cordially,

Jill E. Shibles

Judge Jill E. Shibles
President, NAICJA

Enclosure

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NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

RESOLUTION 98-02

WHEREAS, the National American Indian Court Judge Association ("Association") was incorporated in the State of Delaware on March 31, 1969, and

WHEREAS, the objectives and purposes of the Association include: (a.) to foster the continued development, enrichment and funding of tribal justice systems as a visible exercise of tribal sovereignty and self-government, (b.) to provide continuing education for tribal judges and tribal justice staff members in order to promote and enhance the operation of the tribal judiciary, (c.) to further the public knowledge and understanding of tribal justice systems; and

WHEREAS, the Association's Board of Directors are delegated with responsibility to carry out the objectives and purposes of the Association; and

WHEREAS, Senator Slade Gorton (R-WA) has introduced S. 1691 entitled the "American Indian Equal Justice Act" which would require Indian tribes, tribal corporations and tribal members to collect excise and sales taxes on sales to non-members of the Indian tribe, would waive tribal immunity of Indian tribes and subject the tribes to suit in the district courts of the United States and state courts, and which would waive tribal immunity for civil rights actions alleging a violation of the Indian Civil Rights Act; and

WHEREAS, Senator Ben Nighthorse-Campbell, Chairman of the U.S. Senate Committee on Indian Affairs has requested "[i]n furtherance of the Committee's resolution to fully air the issues implicated by this legislation . . . the formal views of the Association on [the legislation]."

WHEREAS, this legislation if approved would effectuate an abrogation of treaty rights, the federal government's trust responsibility to Indian tribes and nations, two hundred years of federal Indian law and policy, and international human rights; and

WHEREAS, the sovereignty of Indian tribes was first recognized by the U.S. Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) in which Chief Justice Marshall stated that Indian nations were: "distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States", and

WHEREAS, this legislation would clearly infringe on the inherent sovereign authority of an Indian tribal government to make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959);

WHEREAS, tribal authority over the activities of non-Indians on reservation lands is an important aspect of tribal sovereignty. *Montana v. United States*, 450 U.S. 544 (1981), *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Fisher v. District Court*, 424 U.S. 382 (1976); and

WHEREAS, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 889-893 (1986), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165 (1977); and

WHEREAS, the United States Government and the governments of its 50 states as sovereigns were entitled to elect or not elect to waive sovereign immunity and to set limitations on such waivers as they found appropriate and likewise, tribal governments possess the same right of election; and

WHEREAS, the findings of S. 1691 fail to recognize the fact that many tribal governments having exercised the power of self-government have already waived immunity from suit for a wide range of actions where the tribes found such waivers to be appropriate; and

WHEREAS, the U.S. Supreme Court held in *Santa Clara Pueblo v. Martinez*, that suits against an Indian tribe under the Indian Civil Rights Act ("ICRA") are barred by tribal sovereign immunity from suit and that "providing a federal forum for issues arising under [ICRA] constitutes an interference with tribal autonomy and self-government . . ."; and

WHEREAS, "[t]ribal forums are available to vindicate rights created by the ICRA . . .[and] [t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*; and

WHEREAS, this bill if adopted, would be a clear abrogation of section 402 of the ICRA which provides that any further grants of Indian country jurisdiction to states could only be accomplished "with the consent of the tribe occupying the Indian country"; and

WHEREAS, civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts" *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); and

WHEREAS, this bill would be in direct contravention of Congressional finding (6) of the Indian Tribal Justice Act (25 U.S.C. 3601) which articulated that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights"; and

WHEREAS, Indian tribal justice systems are committed to providing fair and just proceedings meeting the guarantees of due process and equal protection, and have consistently demonstrated their ability to conduct such proceedings; and

WHEREAS, the National American Indian Court Judges Association has devoted the past three decades to providing continuing judicial education in order to promote and enhance the operation of tribal justice systems;

NOW THEREFORE, BE IT HEREBY RESOLVED, that the National American Indian Court Judges Association opposes the adoption of S. 1691, "American Indian Equal Justice Act," as an unwarranted and egregious infringement on tribal sovereignty, self-government and jurisdiction in direct contravention of tribal treaty rights, the federal trust responsibility and federal law.

*** *CERTIFICATION* ***

The foregoing resolution was considered and adopted by the Board of Directors of the National American Indian Court Judges Association on the 18th day of March 1998 and the vote was 10 in favor, 0 opposed, and 0 abstaining.

Jill E. Shibles

JUDGE JILL E. SHIBLES, PRESIDENT
National American Indian Court Judges Association

Irene Toledo (jeb)

JUDGE IRENE TOLEDO, SECRETARY
National American Indian Court Judges Association



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March 11, 1998

The Honorable Ben Nighthorse Campbell
United States Senate
380 Russell Senate Office Building
Washington DC 20510-0604

Dear Senator:

We are facing a growing inequity in America. Native Americans are blatantly avoiding state and federal taxes on motor fuels and tobacco products to the detriment of legitimate business operators.

As a third generation convenience store/petroleum marketer, I am acutely aware of the disparity this inequity creates in my extremely competitive industry. Although we do not presently compete with Native Americans, unless Congress addresses this issue, we could soon be faced with the same dilemma markets are dealing with in upstate New York and in other parts of our country.

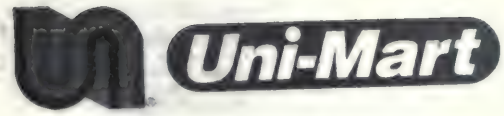
Therefore, I urge you to support Senator Slade Gorton's recently introduced bill, S.1691 and particularly section 3 dealing with the collection of state taxes.

Thank you for your consideration. We are only seeking a level playing field for all competitors.

Sincerely,

Jon D. Stewart
President

JDS/as



March 19, 1998

The Honorable Ben Nighthorse Campbell
United State Senate
380 Russell Senate Office Building
Washington, DC 20510-0605

Dear Senator Campbell:

Senator Gorton (R-WA) introduced legislation recently which, if adopted, will address the Native American tax collection issue. The next step in the process is public hearings with the first of three scheduled for March 11. Mobil Corporation has been working with Senator Gorton's staff as well as SIGMA, PMAA and NACS on this issue.

As background, states have the right to impose and collect state excise and sales taxes. However, the doctrine of sovereign immunity shields Native American tribal governments from legal challenges to enforce this collection. The result has been an inability of some states to collect taxes on the sale of gasoline and cigarettes to non-Native Americans. It is estimated that almost $1 billion in state excise tax revenues annually will be lost through Native American tax evasion in 1998 alone. The impact is not limited just to the surrounding businesses, but taxpayers in general, as the lost revenue could be used to improve roads, schools and public services in general.

Mobil distributors, for which Uni-Marts is one, operating in upstate New York can attest first hand to the impact tax evasion has had on our respective businesses. We are concerned that as the advantage tax evasion provided to Native American businesses expands, as it is doing, others will be equally disadvantaged.

Uni-Marts, Inc. 477 East Beaver Avenue • State College, PA 16801-5690 • Phone: (814) 234-6000

Senator Gorton's bill, S 1691, particularly Section 3 dealing with the collection of state taxes, provides a solution to this growing problem. It is important during Committee hearings that members of Congress are made aware of our concerns. Please note our platform.

Sincerely yours,

Jill S. Swanson
Vice President of Development
and Human Resources

JSS/cak

Sacramento
Urban
Indian
Health
Project
Inc.

[illegible]

[illegible]

[illegible]

Sacramento

California

[illegible]

March 4, 1998

Senate Committee on Indian Affairs
838 Senate Hart Office Bldg.
Washington, D.C. 20510

Chairman Nighthorse Campbell

Mr. Chairman:,

The intent of this letter is to submit written testimony to your committee's hearing scheduled for March 11, 1998, regarding Native American Sovereignty.

As the Executive Director of Sacramento Urban Indian Health Service Project, Inc., I am **NOT** in favor of requiring any Tribe who receives Federal resources to waive any claim of immunity in civil action in Federal Courts.

As Sovereign nations, only Tribes have the right to waive their sovereign immunity and such a waiver should not be forced or imposed upon them. Indian governments, just as with our own constitutions, constituent and judicial systems deserve to be protected from legal challenges or suits as a nation. The United States would not and should not challenge another nation's sovereignty.

Imagine your committee holding a hearing regarding the sovereignty of France, Japan or England, all of whom have their own constitutions, constituent, and judicial systems, and receive funds from the United States.

Mr. Chairman, is this hearing not an attack on Tribal sovereignty? This hearing is an abrogation of the Federal Government's responsibility to provide services to Indians based upon Treaties and Executive Orders, to mention a few.

Again, I am **NOT** in favor of, nor do I support requiring any Native American Tribe to waive their sovereignty for any purpose.

Sincerely,

Daniel L. Tatum, MBA
Executive Director

The Society for Applied Anthropology

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March 16, 1998

Senator Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
838 Hrt Senate Office Building
Washington, D.C. 20510

Ref: Hearings on sovereign immunity, 3/11/98

Dear Senator Campbell:

The Society for Applied Anthropology wishes to submit the following written testimony for the committee's oversight hearing on sovereign immunity issues, held March 11, 1998. Please include our testimony in the hearing record.

Statement on Tribal Sovereign Immunity by Dr. John Young, President, Society for Applied Anthropology.

The Society for Applied Anthropology is an international organization with over 2,300 members concerned with the application of the social sciences to the resolution of contemporary human problems. The society is comprised of professionals from many occupations, including academia, business, law, health care, the non-profit sector, and government. Our members come from a variety of disciplines: anthropology, sociology, economics, planning, and other applied social and behavioral sciences. What unites us is a commitment to applying social knowledge for the public good, a commitment exemplified by the career of one of our founding members, Margaret Mead.

The Society for Applied Anthropology is opposed to S. 1691 and other measures that have the effect of further compromising the sovereignty of American Indian tribes.

One need identified by proponents of S. 1691 is the opportunity for non-Indians to press tort claims against tribal governments for injuries suffered on tribal lands. S. 1691 treats this problem by requiring tribal governments to waive sovereign immunity and consent to civil actions in federal or state courts. There are better solutions. For example, a number of tribes currently carry insurance to cover potential liability from tort claims. This practice could be expanded through a federally established or federally guaranteed insurance program providing tort coverage under such circumstances for all federally recognized tribes. Such an approach would address the legitimate issue without requiring tribes to relinquish sovereign immunity.

Similarly, we would encourage the Committee to explore cooperative solutions to any other legitimate policy issues involving the interaction of tribal governments with non-tribal individuals or jurisdictions that would not compromise the principle of tribal sovereignty.

As this Committee is well aware, since Chief Justice Marshall's 1831 decision defining American Indian tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, the nature and limits of tribal sovereignty have been defined and redefined through both case law and statute. We do not propose to

re-explore that record. Nonetheless, the history of tribal-federal relations in the United States strongly suggests, for both moral and practical reasons, that tribal sovereignty is essential to the cultural and political viability of American Indian communities. Federal Indian policy in the nineteenth and twentieth centuries has resembled a swinging pendulum, moving from the allotment era of the 1830s, through the community-oriented Indian Reorganization Act of the 1930s, the termination regime of the 1950s, and finally to the policy of tribal restoration beginning in the 1970s. The lesson of this history is clear. American Indians suffered disastrously as a result of policies that sought to undermine the shared basis of their communities: a common land base, the preservation of tribal languages, freedom of worship, and the right to political representation through sovereign tribal governments.

The Society for Applied Anthropology believes that the broad direction of congressional Indian policy over the past two decades has been appropriate. This policy is exemplified by the 1975 Indian Self-Determination and Education Assistance Act. Congress wisely sought to avoid the extremes of bureaucratic paternalism and forced assimilation. As the Committee on the Rights, Liberties, and Responsibilities of the American Indian reported in 1966, the "objective which should undergird all Indian policy" is that "the Indian individual, the Indian family, and the Indian community be motivated to participate in solving their own problems." As a result of this policy direction, American Indian communities in the 1990s are engaged constructively in economic development, environmental conservation, education, child welfare, health care, and a range of other endeavors that collectively have significantly improved the quality of life of Indian peoples and the viability of their communities. Effective tribal governments stand at the center of this endeavor. The principle of tribal sovereignty is essential to their effectiveness. We urge the Committee on Indian Affairs to reject any legislation that would turn back the clock, undermining several decades of progress in the ongoing relationship between federal and tribal governments in this country.

Sincerely,

John A. Young
SfAA President

c: Amy Wolfe, Secretary
Rob Winthrop
Sally Robinson
Jonathan Reyman

○

ISBN 0-16-057174-X



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